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Former Taliban Civil Servant's Wife Not Entitled to Visa Denial Explanation

The wife of a former civil servant for the Taliban isn't entitled to further explanation of why the U.S. government denied his visa application, a sharply fractured court decided June 15 (*Kerry v. Din*, 2015 BL 187890, U.S., No. 13-1402, 6/15/15).

Fauzia Din, a naturalized citizen, argued that she was denied due process when a consular officer, without adequate explanation for the denial, deprived her of her constitutional right to live in the U.S. with her husband.

''There is no such constitutional right,'' Justice Antonin Scalia wrote for a plurality of three.

But six justices disagreed with this analysis.

Although he concurred in the result, Justice Anthony M. Kennedy wrote that the disposition of this case—vacating the ruling of the U.S. Court of Appeals for the Ninth Circuit below—''should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of an alien spouse.''

His opinion, joined by Justice Samuel A. Alito Jr., said that even assuming that such a right existed, ''the notice she received regarding her husband's visa denial satisfied due process.''

Justice Stephen G. Breyer—joined in dissent by the other three justices of what is often called the court's liberal wing—disagreed with both Scalia and Kennedy, arguing that Din ''possesses the kind of 'liberty' interest to which the Due Process Clause grants procedural protection,'' and that the government ''failed to provide her with the process that is constitutionally 'due.' ''

Several scholars, including Kevin Johnson, dean of U.C. Davis School of Law, Davis, Calif., were watching this case because of its potential to revise the doctrine of consular non-reviewability, under which courts may not review decisions made by consular officers.

Although ''the debate in this case was really about the scope of Din's constitutional right,'' and not non-reviewability, Johnson told Bloomberg BNA in June 15 e-mail that ''[a] majority of the Court appears to be willing to allow'' review, and he noted that in this case, six justices—all but those in the plurality—actually reviewed the denial.

In a June 15 phone call, Johnson told Bloomberg BNA that this was ''the most moderate course'' the court could have taken in this case, and said that it was ''consistent with the Roberts court's approach to immigration cases.''

The decision's ''predictive value for the same-sex marriage cases raises some interesting possibilities,'' Ruthann Robson, a professor at the City University of New York School of Law, Long Island City, N.Y., said on her blog, Constitutional Law Prof Blog, although she also acknowledged the decision was ''fragmented.''

A decision is expected in the same-sex marriage cases—*Obergefell v. Hodges*, No. 14-556 (*argued* 4/28/15) (83 U.S.L.W. 3827, 5/5/15)—later this month.

Historical Analysis. Scalia described Din's husband, Kanishka Berashk, as a ''former civil servant in the Taliban regime'' that once ruled Afghanistan. When Berashk's visa application was denied, the government informed him and Din that the denial was under 8 U.S.C. § 1182(a)(3)(B) of the Immigration and Naturalization Act, which makes ''terrorist activities'' a ground for inadmissibility.

As an unadmitted nonresident alien, Berashk had no cause of action to press for further information. So Din sued, arguing that the denial violated her rights.

In examining this claim, Scalia reaches back to the origins of the due process clause in Magna Carta—800 years to the day after it was signed—and to Blackstone's 18th Century Commentaries on the Laws of England.

In this historical context, Din's claim that the visa denial deprived her of liberty was ''absurd'' because she had not, among other things, been imprisoned, arrested or put in stocks, Scalia said.

Even if one were to accept the ''textually unsupportable doctrine of implied fundamental rights'' that extend beyond the historical limits of due process, Scalia would hold that Din's asserted right fails because it is not '' 'objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty,' '' he said, quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997).

But a ''long practice of regulating spousal immigration precludes Din's claim'' that the denial deprived her of what Scalia termed a ''free-floating and categorical liberty interest in marriage.''

Robson told Bloomberg BNA in a June 15 e-mail that the plurality opinion ''need not have engaged with the 'liberty' query'' to decide the case, but that ''it has obviously been one in which he is interested for many

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years.'' She noted that Scalia also relied on *Glucksberg* in his dissent from the decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which found a protected liberty interest in private consensual sexual conduct.

Constitutional Avoidance. Kennedy refused to engage in the constitutional interest analysis, because ''even assuming she has such an interest, the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar, 8 U.S.C. § 1182(a)(3)(B).''

According to Kennedy, this derives from the court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which held that in the immigration context, the government needs only a ''facially legitimate and bona fide'' reason for taking action.

''This reasoning has particular force in the area of national security,'' Kennedy said.

In this case, the mere citation to the provision under which Berashk's application was denied sufficed to show a ''facially legitimate'' reason for excluding him.

It also indicates that the denial was ''bona fide,'' because it ''specifies discrete factual predicates the consular officer must find to exist before denying a visa.'' This, along with Berashk's admitted prior employment with the Taliban government, ''provides at least a facial connection to terrorist activity,'' which ''*Mandel* instructs us not to 'look behind,' '' Kennedy said.

''The specter of terrorism certainly haunts the case,'' Robson said. ''For Kennedy (and Alito), it is almost as if the very word is sufficient,'' she said.

Johnson agreed, saying that the case would likely have been easier for the court if it didn't involve ''the specter of terrorism,'' and that a ''run-of-the-mill'' visa application denial for ''virtually any other reason'' would have been a different case.

Given that terrorism was involved, Johnson said that he wasn't surprised that the court didn't move the needle one way or the other on the issue of whether or not consular decisions are judicially reviewable.

He also said that many consular decisions are made, every day, in U.S. embassies around the world, and a decision strongly favoring review of consular decisions ''raises the specter of floodgates of appeals'' of those decisions, although he suspected that this fear was unlikely to be realized.

Sparring Partners. Breyer in dissent disagreed with both Scalia and Kennedy.

He argued that ''[t]he liberty for which Ms. Din seeks protection easily satisfies'' due process standards.

He said the ''institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life,'' and that statutory law, including visa law, ''surrounds marriage with a host of legal protections to the point where it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure.''

The ''more difficult question'' was what level of process was due, Breyer said. Here, however, Din only asked an explanation of the denial, and ''the Constitution requires the Government to provide an adequate reason why it refused to grant'' the visa.

Unlike Kennedy, he disagreed that merely citing the statute satisfied this requirement.

''For one thing,'' the provision ''sets forth, not one reason, but dozens'' for denying a visa, ''cover[ing] a vast waterfront of human activity'' that ''might fall within the broad, statutorily defined term 'terrorist,' '' including such activities as selling newspapers and letting individuals sleep on temple floors.

In addition, the reason ''did not set forth any factual basis for the Government's decision.''

The generality of the statutory provision and the lack of factual basis therefore mean that ''the reason given cannot serve its procedural purpose,'' and was therefore constitutionally inadequate, Breyer said.

Same Sex Marriage Preview? Lurking in the background of this case, about the bounds of the constitutional protection for marriage, is the impending decision in the same sex marriage cases.

Both Scalia and Breyer spent significant portions of their opinions responding to each other. Johnson suggested that this back-and-forth had less to do with immigration and more to do with the marriage cases. The impending decision seems to be ''focusing their minds on that issue,'' and Johnson speculated that both used their opinions to either ''tee up'' a future opinion in the marriage cases, or at least indicate that the justices have ''had a lot of discussions'' about them.

Robson agreed that there were possible signals regarding the future *Obergefell* decision, and noted that Breyer's dissent ''articulates an expansive liberty interest in marriage under the due process clause that could easily be imported into *Obergefell*.''

She also said that ''Justice Scalia's refusal to recognize a liberty interest in marriage is not one'' that Kennedy and Alito are subscribing to—at least ''in this case.''

Kennedy ''is being closely watched as potential author in favor of Obergefell, and there is nothing in *Din* that would mitigate that judgment,'' Robson said.

Mark E. Haddad of Sidley Austin LLP, Los Angeles, argued for Din. Deputy Solicitor General Edwin S. Kneedler argued for the government.

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Full text at http://www.bloomberglaw.com/public/document/Kerry_v_Din_No_131402_2015_BL_187890_US_June_15_2015_Court_Opinio and 83 U.S.L.W. 4417.

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