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Contact: Trina Realmuto, 617 227-9727 ext. 8
Jessica Chicco, 617 552-9261

Judge Orders State Department, Other Federal Agencies, to Produce Records Relating to Claimed “Policy and Practice” of Returning Deportees Who Win Their Court Cases
New practice advisory aims to assist prevailing litigants in returning to United States

Just before the New Year, a federal judge ordered a group of federal agencies to search properly for documents related to its alleged policy of returning noncitizens after courts invalidate their removal orders. In an opinion dated December 26th, Judge Jed S. Rakoff of the Southern District of New York found that the Department of State (DOS), Department of Justice (DOJ), and Department of Homeland Security (DHS) had failed to meet their obligations under the Freedom of Information Act (FOIA). The judge ordered DOS to redo its search, which he found was not “reasonably calculated to uncover all relevant documents.” He also directed DOJ to expand its search and ICE to explain its search methodology.

The government’s claimed process for returning prevailing noncitizens depends crucially on the active involvement of DOS, but so far the agency has not produced any policy documents that speak to the issue or even a single record of a case in which it facilitated a noncitizen’s return. Following the court’s order, DOS must search for such records in its overseas posts in Jamaica, the Dominican Republic, Mexico, Guatemala, and El Salvador.

The question how already-removed noncitizens who prevail in court may return to the United States is one that has frustrated immigration practitioners for years. Government lawyers and officials, too, have expressed uncertainty and confusion about the process, in documents produced pursuant to earlier orders by Judge Rakoff in the same litigation (*National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y., May 12, 2011)). Given this uncertainty, advocates were taken by surprise when in 2009 the Solicitor General (SG), in a brief to the Supreme Court, claimed that “[b]y 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.” That statement led to the FOIA lawsuit over which Judge Rakoff now presides.

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In a letter to the Supreme Court last year, the SG's office admitted that there was no basis for their statement, but urged the Court not to revisit the question, stating that the government had since issued a return directive which now provides the relief claimed to exist in 2009. Advocates, several of whom are plaintiffs in the FOIA case, continue to doubt the veracity of that claim:

"Noncitizens who prevail in court after their removal then face separate battles with an array of federal agencies," said Trina Realmuto, Staff Attorney at the National Immigration Project of the National Lawyers Guild. "The government's claimed 'policy' covers only a subset of noncitizens who prevail in court, and is plagued by disorganization, delay, and intransigence."

"Winning in court is meaningless for noncitizens who are not then reunited with their families and communities in the United States," said Jessica Chicco, Supervising Attorney at the Post-Deportation Human Rights Project.

The National Immigration Project, the American Immigration Council, and the New York University School of Law Immigrant Rights Clinic recently published a practice advisory to assist prevailing litigants in navigating the obstacles to returning to the United States. The advisory is available on the National Immigration Project website at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Return_to_US_After_Successful_Petition_for_Review_or_%20Motion%20%2812-21-2012%29.pdf.

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*The **National Immigration Project of the National Lawyers Guild** is a non-profit organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws, including noncitizens in immigration proceedings and persons who have been removed. The National Immigration Project has been promoting justice, transparency and government accountability in all areas of immigration law and social policies related to immigration for over forty years.*

*The **Post-Deportation Human Rights Project**, based at the Center for Human Rights and International Justice at Boston College, is a legal advocacy project devoted to the representation of individuals who have been deported and the promotion of the rights of deportees and their family members.*

The FOIA case documents are available at <http://nationalimmigrationproject.org/legalresources.htm#nipnlg> and upon request.