

No. 11-2576
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Cheikh LAM,)
)
Petitioner,)
v.)
)
Eric H. HOLDER, Jr.)
Attorney General of the)
United States,)
)
Respondent.)

DECLARATION OF JESSICA CHICCO

I, JESSICA CHICCO, do swear and affirm under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. I am the supervising attorney at the Post-Deportation Human Rights Project at Boston College, a project dedicated to the representation of individuals who have been deported from the United States. I am a member of the bars of New York and Massachusetts. I submit this declaration in support of Petitioner's motion for a stay of removal and in response to the government's claim that it has an effective system for returning immigrants who are deported during the pendency of the adjudication of their petitions for review by the courts of appeals.

2. On December 17, 2009, through counsel in the Immigrant Rights Clinic at New York University School of Law, the Post-Deportation Human Rights Project and co-plaintiffs the National Immigration Project of the National Lawyers Guild, the American Civil Liberties Union Foundation, the Immigrant Defense Project, and Professor Rachel Rosenbloom, filed a Freedom of Information Act (FOIA) request to the Department of Justice, the Department of Homeland Security, and the Department of State. That request sought information related to each agency's efforts to facilitate the return of individuals who were removed from the United States or who left the country after accepting voluntary departure or self-deportation, and (a) whose removal orders were subsequently vacated or reversed by any United States federal court and/or (b) whose immigration cases were subsequently reopened by an Immigration Judge or the Board of Immigration Appeals, and for whom the Department of Justice acted to facilitate the individuals' return to the United States.

3. In subsequent correspondence with the agencies regarding the adequacy of their searches, Plaintiffs further specified that notes, documents, or any other agency records that support the government's assertion in *Nken v. Holder*, 129 S. Ct. 1749 (2009), regarding the existence of a policy and practice of facilitating individuals' return to the United States, would be responsive to their request. This assertion was made in the Solicitor General's brief to the Supreme Court in *Nken*, which stated: "By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effect 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." Government Brief for Respondent at 44, *Nken v. Holder*, 129 S. Ct. 1749 (2009) (No. 08-681), 2009 WL 45980 at *44, Ex. A. The Supreme Court cited this statement in its April 2009 decision in *Nken*, which found that "the

burden of removal alone cannot constitute the requisite irreparable injury,” because “those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal.” *Nken*, 129 S. Ct. at 1761. Lower federal courts in turn have treated the Court’s finding in *Nken* as fact. *See, e.g., Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (observing that the possibility of deportation does not alone constitute irreparable harm because petitioners “can be afforded effectively relief by facilitation of their return, along with restoration of the immigration status they had upon removal.”); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 (5th Cir. 2010) (explaining that, after *Nken*, “the burden of removal alone does not by itself constitute irreparable injury for purposes of granting a stay of removal”); *Desire v. Holder*, No. 08-1329, 2009 U.S. Dist. LEXIS 116561, at *4 (D. Ariz. Dec. 14, 2009) (quoting *Nken* to conclude that “aliens who prevail in their petitions for review ‘can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal’”); *Villajin v. Mukasey*, 2009 WL 1459210 (D. Ariz. May 26, 2009) (“[I]f Petitioner ultimately succeeds on the merits of her claim, she can be reunited with her children.”). The government continues to cite to *Nken* in its briefs in opposition to motions for stays of removal. *See, e.g.,* Respondent’s Assented-To Motion for Leave To File a Reply Brief in Support of His Motion to Dismiss the Habeas Petition at 2, *Sampathkumar v. Donelan*, No. 11-11867 (D. Mass. Jan. 30, 2012); Respondent’s Opposition to Petitioner’s Motion for a Stay of Removal at 12, *Gomez v. Holder*, No. 12-173 (2d. Cir. Feb. 17, 2012) (citing *Nken* for the proposition that “the burden of removal alone cannot constitute the requisite irreparable injury”).

4. In response to this clarified FOIA request, the only records that the government produced as supporting its factual statement to the Supreme Court in *Nken* were several heavily redacted

email chains, including email correspondence with the Office of the Solicitor General. *See* OSG Productions (Sept. 16, 2011; Feb. 16, 2012), Ex. B. Plaintiffs challenged the redactions in a motion for summary judgment submitted to Judge Rakoff on October 11, 2011. *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *National Immigration Project v. Dep't of Homeland Security*, -- F.Supp.2d -- (S.D.N.Y. 2011) (No. 11 Civ. 3235), 2012 WL 375515.

5. On February 7, 2012, Judge Rakoff ordered release of portions of the redacted e-mails. Judge Rakoff agreed with Plaintiffs' argument that, as the only basis provided for the government's assertion to the Supreme Court, the factual statements in the OSG emails should be disclosed. *National Immigration Project*, 2012 WL 375515 at *1. Finding little evidence of agency policy or practice consistent with the government's representation to the Supreme Court, Judge Rakoff stated that it seemed "the Government's lawyers were engaged in a bit of a shuffle." *Id.* at *1. Judge Rakoff referred to Plaintiffs' Rule 56.1 Statement of Uncontested Facts in concluding: "None of the records produced identifies a written policy. . . . ICE records show that officials frequently do not know whom they should contact to facilitate return. In some situations where ICE used parole, agency employees still expressed confusion about how to physically return a deportee. For example, in one email from 2009, an undisclosed person writes, 'How this is handled has alw[redacted] haphazard.' Other records admit that the Government's use of parole would not restore the status that removed aliens had prior to their removal. ICE records do not contain any publicly accessible forms or instructions for individuals whose removal orders have been reversed or vacated." *Id.* at *5-6 (internal citations omitted) (citing Plaintiffs' Rule 56.1 Statement of Uncontested Facts at ¶¶ 36, 39, 42, 44, 48).

6. The opinion was widely covered in the news media. *See, e.g.*, Jess Bravin, *Judge Suggests U.S. Misled Court on Immigration Policy*, WALL STREET JOURNAL (Feb. 10, 2012); Editorial, *Immigration, Deportation—And No Right to Return?*, L.A. TIMES (Feb. 13, 2012), available at <http://articles.latimes.com/2012/feb/13/opinion/la-ed-deport-20120213>; Alison Frankel, *Rakoff: DOJ may have engaged in a 'shuffle' in SCOTUS brief*, THOMSONREUTERS (Feb. 10, 2012), available at <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=39195>; Lyle Deniston, *Significant feud over an SG brief*, SCOTUSBlog (Feb. 13, 2012, 2:40PM), <http://www.scotusblog.com/2012/02/significant-feud-over-an-sg-brief/>; Adam Klasfeld, *Solicitor General May Have Misled on Immigration*, COURTHOUSE NEWS (Feb. 08, 2012, 08:09AM), <http://www.courthousenews.com/2012/02/08/43723.htm>. Exs. Q–U.

7. Although Judge Rakoff temporarily stayed his decision on February 24, 2012, the opinion granting the stay again called into question whether the government’s representation to the Supreme Court in *Nken* was “accurate or inaccurate,” stating: “[T]he only thing the Government has listed in response to plaintiffs’ FOIA request that even comes close to a particularized statement of the alleged policy and practice is the factual description of it in the email chain”—the material that he previously ordered released. *National Immigration Project*, 2012 WL 375515 at *10.

8. ICE Directive 11061.1, issued on February 24, 2012 by the agency’s Director, John Morton, comes on the heels of the District Court decision ordering disclosure of redacted material in the OSG emails and suggesting that the Supreme Court may have been misled about the existence of government policy and practice to facilitate the return of individuals who have been wrongfully deported. While the new directive, entitled “Facilitating the Return to the

United States of Certain Lawfully Removed Aliens,” purports to describe “existing policy,” it clearly states that it does not supersede any prior policy or directive. Furthermore, it provides no details on how the policy is to be implemented. Under the heading “Procedures/Requirements” it states: “None.” ICE Directive 1106.1: Facilitating the Return to the United States of Certain Lawfully Removed Aliens (Feb. 24, 2012), Ex. O. This is in stark contrast to other directives of this type, which include extensive discussion of implementation procedures. *See, e.g.*, ICE Directive 11022.1: Detainee Transfers (Jan. 4, 2012), Ex. P.

9. Documents produced in response to the National Immigration Project et al. FOIA request to date illustrate the lack of any clear policy, procedures, or guidelines regarding how to treat individuals who prevail in their immigration cases after having been deported. *See* Exs. K–N (partially redacted emails included as Exhibits V, W, AA, and BB to Plaintiff’s Motion for Summary Judgment, *National Immigration Project v. Dep’t of Homeland Security*, -- F.Supp.2d -- (S.D.N.Y. 2011) (No. 11 Civ. 3235), 2012 WL 375515)). These and other un-redacted portions of emails produced by the U.S. Immigration and Customs Enforcement Agency (ICE) in response to the request reflect confusion within the agency not just about how to facilitate individuals’ return, but about whether to do so at all. *See* Exs. C–J.

10. For example, in emails exchanged with the ICE Office of the Principal Legal Advisor in November 2009—over nine months after the government represented to the Supreme Court that it had a policy and practice of affording individuals effective relief—government officials describe pervasive confusion and call for the development of guidance on this issue because none exists. One correspondent writes, “I think that there has been a lot of confusion in the field about how these cases are handled, resulting in reoccurring questions about how to handle these cases from our field offices.” Another states, “I believe it would be appropriate for OPLA Field

Ops to issue guidance to the field offices on the handling of cases where an alien has been removed, and thereafter becomes entitled to return to the United States, either by way of the Board granting of a motion to reopen, or remand by a circuit court.” ICE production 2010FOIA1959.001857-1859, Ex. C.

11. An email from the Chief of the Appellate and Protection Law Division of OPLA, dated November 24, 2009 with the subject line: “Return of Removed Aliens Following Circuit Court Remand or PFR Win,” reflects the absence of any established agency policy on how to handle the case of someone removed while his petition for relief and motion for a stay were pending. The sender writes: “The question posed by OIL is how the alien would be treated if he were to return to the United States following a grant of the PFR and/or remand to the BIA and EOIR for further proceedings. . . . While we can certainly provide OIL a limited, case-specific response to meet this deadline, it seems that we should be thinking about developing a broader, OPLA-wide position on an issue of this significance. For this case, APLD recommends that OIL be informed that they can represent to the Ninth Circuit (if asked) [redacted]. After you hear from them, could you please let us know your preference in how we respond to OIL and whether you’d like us to move forward on developing general guidance on this issue?” ICE Production 2010FOIA1959.001306-1307, Ex. D.

12. Email correspondence from August 2009 recounts the difficulty than an individual has had returning to the United States after the Board of Immigration Appeals terminated his proceedings the previous year, and highlights the burden placed on individuals seeking to return. One email states: “Sounds like we are all in agreement with the need to facilitate return, but with no real idea on how to accomplish [sic]. As I always tell people at parties who ask for immigration advice, ‘I know how to kick people out, but not how to get them in.’” ICE

Production 2010FOIA1959.001835, Ex. E. Another email in the same chain indicates that the agency considers it the responsibility of the deported individual to request documents needed for his return: "Since ICE does not issue green cards we have taken the position that we can verify the information for the issuing office if they have a question, but it requires action on the alien/counsel's part to initiate the request." ICE production 2010FOIA1959.001836, Ex. E.

13. Other emails indicate uncertainty within the agency about both *how* to bring individuals back and *whether* to effectuate their return at all. On August 17, 2010, an email asks whether ICE can facilitate the reentry of an immigrant who has been deported but whose case may be remanded for a new hearing: "The petitioner's attorney has agreed to not oppose a remand of this case so long as ICE 'will issue [the alien] some form of evidence of LPR status that will enable him to board a plane and enter the U.S.' Is this something that ICE will agree to do?" ICE Production ICE702-703, Ex. F. Later in the same email chain, a September 2010 email asks: "Could someone please review this and let me know if you believe this alien should be brought back? We do not believe the alien needs to be brought back at this point." ICE Production ICE700, Ex. F. In a subsequent email, the Acting Deputy Director for Immigration Law and Practice at OPLA responds, indicating, "[T]his question does come up perpetually." ICE Production ICE697, Ex. F.

14. Emails exchanged in December 2009 and January 2010 evince the grudging attitude of agency employees toward bringing back individuals for a cancellation hearing, and the lack of certitude as to how in fact to effectuate their return. An email from the Chief Counsel in the Office of Chief Counsel in Philadelphia, dated January 4, 2010 states: "Nine years after removal OPLA HQ is directing us to work with you to return this guy on Significant Public Benefit parole so this drug trafficker can get his cancellation hearing. I don't know if York can handle

this directly or your office has to initiate this request. ..." ICE Production

2010FOIA1959.002443, Ex. G. Emails from May 2005 reflect a similar stance: "I don't know if we want to dig in our heels, but I don't think a court has the authority to make us bring someone back or to parole them. I see this as a big 'P' Policy issue." ICE Production 2010FOIA1959.001902, Ex. H.

15. Older emails suggest that this confusion has reigned for years. An email exchange from April 2006, with the subject line "RE: Short fuse for OCC: alien's PFR granted and removal order vacated . . . is he an arriving alien when he comes back to U.S.?", reflects uncertainty about the legal status of individuals who return after prevailing in their cases, the lack of any guidance in the agency manual, and the unwillingness to pay for individuals' travel: "I don't know what basis there would be to have the person in proceedings. I didn't find anything in DHS Field Manuals that directly addresses this, but the whole intent of the IIRIRA jurisdictional change was to allow such persons to pursue their PFRs from abroad and not impede us from removing them. But when we do remove them while a PFR is pending, it seems we do so at our own risk that we might lose and the alien might be entitled to return. This happens in a handful of cases each year . . . And generally our position has been that we have no obligation to pay for the alien's return, but that we will clear lookouts, etc. so that the al [redacted] upon return." ICE Production 2010FOIA1959.001524, Ex. I.

16. An email from January 2006 cites earlier correspondence as "useful background for these 'return' issues [that] points out some of the pitfalls and how 'ad hoc' some of the process can be." ICE Production 2010FOIA1959.001246, Ex. J. Those prior emails state: "Unfortunately, there's no clear cut answer. [Redacted] is correct that if we parole him back in we change his status w/all the attendant issues that raises. Boarding letter is the way to go. Problem is, however,

that the Parole and Humanitarian Assistance Branch at HQ doesn't issue boarding letters, they only do parole. So what to do? Some OCC have worked this out at the local level w/FOD, but what's really happening has been impossible to pin down. Is FOD doing his own parole and glossing over it? Is FOD issuing boarding letter and working out admission w/local CBP inspections? I really can't say for sure. This is just about the most frustrating issue I've got on my plate." ICE Production 2010FOIA1959.001246, Ex. J.

17. These emails and other productions received in the National Immigration Project et al. FOIA reveal the lack of any established government policy or procedure for facilitating the return of individuals who prevail in their immigration cases post-deportation. The widespread confusion across agencies about how to handle such cases and the lack of any internal guidelines flies in the face of the government's assurance to the Supreme Court in 2009 that it was "policy and practice" to afford individuals effective relief by facilitating their return and restoring their pre-deportation immigration status. The Supreme Court's reliance on that assertion may well have infected its entire reasoning with regard to the irreparable harm caused by deportation. This analysis has continuing repercussions for the way lower courts adjudicate stays and other requests for relief today.

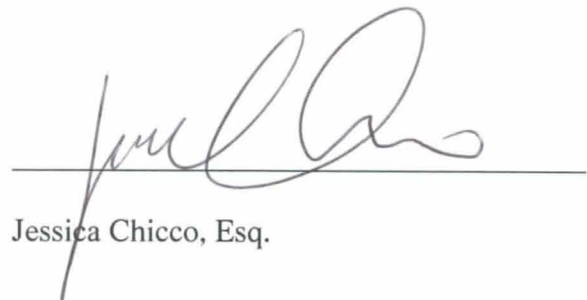
18. In view of the productions received to date in response to the National Immigration Project et al. FOIA suit, the Morton Directive issued in February appears to provide little more than the same empty assurances offered to the Supreme Court in 2009, without including any procedural instructions to make them a reality. All evidence indicates that there is in fact no "existing policy" on returns. The Directive falls far short of providing the guidance that would be needed to effectuate a policy that actually does what the government told the Supreme Court it was already doing back in 2009.

19. The Directive leaves the government unfettered discretion to determine not just *how* but *whether* to facilitate individuals' return at all. It contains a provision allowing the government to decide if an individual's return is "necessary" without defining necessity, and exempts the government from facilitating return in "extraordinary circumstances" without explaining what circumstances would reach that threshold. In addition to these loopholes, the Directive contains outright gaps; it fails to address the situations of numerous individuals who prevail in their cases after deportation, including those who are not lawful permanent residents (like Mr. Nken in *Nken v. Holder*) and others who were erroneously removed.

20. In short, the new Morton Directive does nothing to disprove what the National Immigration Project et al. FOIA case has made clear: the government has failed to produce any evidence that justifies the statement it made to the Supreme Court in *Nken* three years ago, or to demonstrate that it in fact has a policy and practice of facilitating the return of individuals who prevail on their immigration cases after they are deported.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on March 5, 2012.



Jessica Chicco, Esq.