Ninth Circuit Rules Mother and Child’s Deportation Order “Unconscionable”

An innocent mistake leads to a missed court date and a hardhearted order to remove a mother and her four-year-old son. by Maureen Rubin, J.D.

QUEENS, NEW YORK, UNITED STATES, May 24, 2021 /EINPresswire.com/ -- In America this year, Independence Day will be written as 07/04/2021. Most of the world, however, would indicate it by writing 04/07/2021. A similar, understandable mix-up was the basis of the Ninth Circuit’s grant of a petition for review of an “unconscionable” deportation order to return a mother and her child to El Salvador because they failed to appear in immigration court.

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> *Scott Messinger, Queens, NY Immigration Attorney*

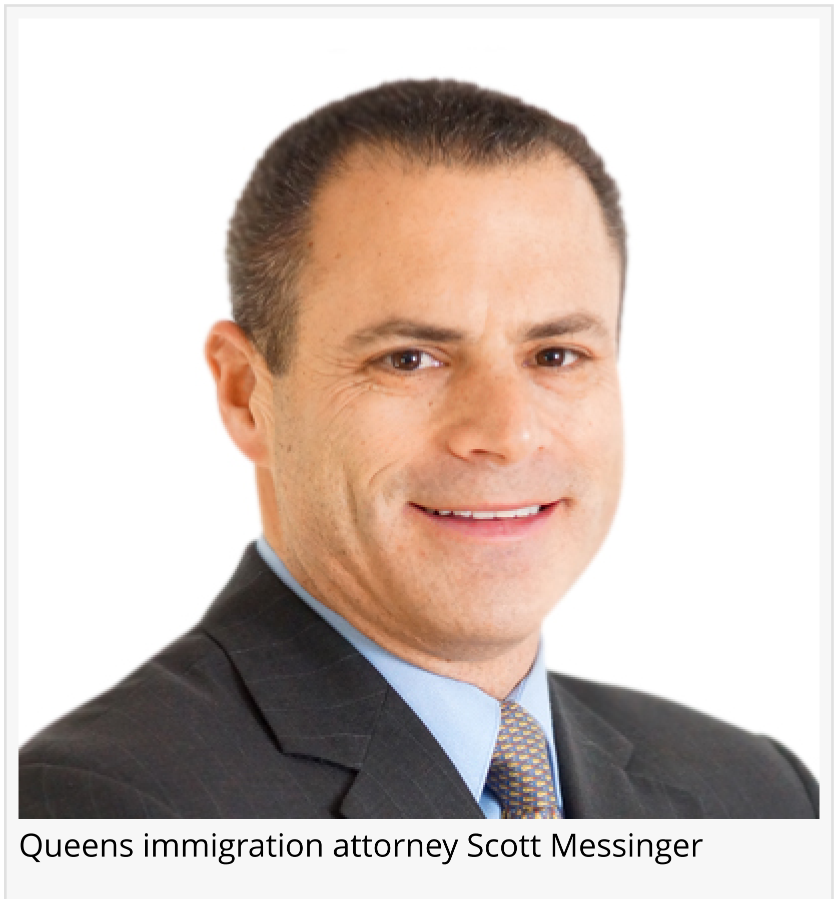
Writing for the United States Court of Appeals for the Ninth Circuit on May 12, Justice Edward M. Chen, United States District Judge for the Northern District of California, who was sitting by designation, granted a petition to review the Bureau of Immigration Appeals (BIA) decision to affirm an immigration judge’s denial of a motion to reopen the case of Patricia Marisol Hernandez-Galand and her minor child.

The facts of the case demonstrate the court’s finding of “exceptional circumstances” that showed the case should be reopened. Justices Kim McLane Wardlaw and Marsha S. Berson were also on the reviewing panel.

Hernandez-Galand appeared before an Immigration Judge (IJ) pro se, or without an attorney, at her initial hearing. At that time, an Immigration Judge told her that her next appearance was set for July 12, 2016. He wrote it down for her as 7/12/16. Unfortunately, Hernandez-Galand had suffered a childhood injury that caused memory loss, so she did not remember that date. Since she can’t read, she asked members of her family to remind her of the hearing date.

In El Salvador, 7/12/16 means December 7th. Much of the world, like the Central American country, puts the day before the month. As a result, she believed her court date was in December and she missed her July court date. The court then filed a motion to remove her and her child in absentia. Two weeks later, she filed a motion to reopen her case, pleading special

circumstances. Her motion to reopen included a declaration, her application for asylum, and an appeal for protection under the Convention Against Torture. The IJ denied her motion and the BIA affirmed their decision.


Queens immigration attorney Scott Messinger

Chen's opinion explained that the Ninth Circuit panel first considered the reliability of petitioner's claim of memory loss and found that since it was "not inherently unbelievable," the BIA erred by disregarding it. A similar finding was made about her family's misunderstanding of the hearing date. Chen did not stop there. He then went on to criticize the BIA's contention that Hernandez-Garland should have confirmed her hearing date by using the court's "automated system." Since she, like many immigrants who seek admission to the United States cannot read and are likely to have neither understanding of, nor access to computers, the court called this assertion an "abuse of discretion."

Next, Chen said the panel faulted the BIA for not examining whether petitioner had any motive for failing to appear and whether a removal order without her being presented would cause "unconscionable results." They found the BIA had no basis for deciding that the petitioner sought to evade or delay her hearing and that its premature order would have an "unconscionable result."

Chen acknowledged that precedent requires those seeking asylum to show a "likelihood of success." New York immigration attorney Scott Messinger of the law firm Gladstein & Messinger in Queens explains that demonstrating a likelihood of success on the merits on an underlying asylum petition is very important when seeking Federal Court review of a case that was denied in the Immigration Court or by the Board of Immigration Appeals. "The Federal Appeals Court," he says, "may not look to overturn a denial if the underlying petition is meritless." In this case, the Ninth Circuit pointed out that this requirement was only one factor among many, and the petitioner made a compelling argument based on "other factors." The court also applied this same reasoning to the status of petitioner's four-year-old child.

Next, Chen described the standards under which the petition was decided. He cited a section of the United States Code and precedent that reads, "The BIA abuses its discretion when it acts

arbitrarily, irrationally, or contrary to the law, and when it fails to provide a reasoned explanation for its actions." He then cited case law that required the Attorney General to look at "the totality of circumstances to determine whether the alien could not reasonably have been expected to appear."

The BIA was faulted for not considering whether "through no fault of their own (petitioners) never had their day in court to present their claims."

Chen summarized the panel's reasoning for granting the petition of Hernandez-Galand and her young son. They found exceptional circumstances due to petitioner's memory problems, her inability to read, her reasonable reliance on family members to tell her the date, their understandable reliance on their interpretation of the date since day before month is the way dates are written in their home country and the BIA's conclusion that petitioner should have used a highly technical automated system to confirm her date. The result was "unconscionable."

Although the Ninth Circuit ruling is a win for Hernandez-Galan, her case took over five years to get to this point, and now she has to start her quest for asylum all over again. According to immigration lawyer Scott Messinger, it is unfortunately very typical for asylum cases to take years to move through the Immigration Court system. However, waiting times vary depending on the jurisdiction and judge, he says. According to attorney Messinger, judges who have been on the bench longer have larger dockets and longer waits than newer judges. The solution? "These wait times could be eased with the installation of a large number of new Immigration Judges," says Messinger. He continues, "The Department of Justice is looking to hire even more. That will do more to decrease the size of the docket."

Hernadez-Galand was represented by attorneys from the ACLU Foundation's Immigrants' Rights Project, the ACLU Foundation of Southern California, the Northwest Immigrants Rights Project, the Pubic Counsel Law Center, and the American Immigration Council. Respondents were represented by attorneys from the Office of Immigration Litigation, Civil Division of the United States Department of Justice in Washington, D.C.

The court remanded the case for further proceedings, and the IJ and BIA will now get another chance to demonstrate that their reliance on America-centric criteria can be misplaced when applied to applicants from other cultures. A shift in priorities and mindset at the DOJ under the new administration could lead to a cultural shift in the immigration system. "Under Trump, Sessions, Barr and Stephen Miller, every effort was made to take any compassion out of the system and turn the courts into a deportation machine," says attorney Messinger. "[Attorney General] Garland will have the ability to dictate the policies of the Immigration Court and how the Department of Justice will enforce the immigration laws." Hopefully, concludes Messinger, more humanity and common sense will be brought back into the Immigration Court system under AG Garland.

And hopefully, “unconscionable” deportation orders will diminish as a result of the sad journey of Hernandez-Galand and her four-year-old son.

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