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THE WALKING DEAD: WHY COURTS OF APPEALS SHOULD NOT DEFER TO BIA OR ATTORNEY GENERAL PRECEDENT DECISIONS THAT HAVE ALREADY BEEN VACATED BY ANOTHER COURT OF APPEALS

Posted on October 20, 2014 by David Isaacson

In my previous post Burning Down the House: The Second and Third Circuits Split on Whether Arson Not Relating to Interstate Commerce is an Aggravated Felony, I raised the issue of whether the Court of Appeals for the Second Circuit in *Luna Torres v. Holder*, No. 13-2498 (August 20, 2014), should have deferred as it did to the decision of the Board of Immigration Appeals (BIA) in *Matter of Bautista*, 25 I&N Dec. 616 (BIA 2011), after the Court of Appeals for the Third Circuit had already vacated that decision in *Bautista v. Attorney General,* 744 F.3d 54 (3d Cir. 2014). As I was reminded by Matthew L. Guadagno in the comments to that post, it is a conventionally accepted rule that "when a precedent decision of the Board is struck down by a circuit court, that precedent decision continues to be followed by the Board in all other circuits unless the Board renders a new decision." But one of the points I had been trying to make in Burning Down the House, although evidently not clearly enough, is that the federal courts should not give deference to the Board's common practice in this regard. This follow-up post attempts to clarify my thinking on the matter.

As I noted in Burning Down the House, it seems in some sense disrespectful of the Third Circuit's decision vacating *Matter of Bautista* for the Second Circuit to have said, as it did, that "*Matter of Bautista* . . . governs Luna's case." Arguably, there was no extant decision and judgment of the BIA in *Matter of Bautista* which could so govern, since it had already been vacated by a court of competent jurisdiction. The precedential decision in *Matter of Bautista*, in an important sense, no longer existed by the time of the Second Circuit's decision. And while the BIA had reached the same result in its unpublished decision in

Luna Torres's case as in *Matter of Bautista*, the Second Circuit had previously held, in *Rotimi v. Gonzales,* 473 F.3d 55, 56 (2d Cir. 2007), that "a nonprecedential decision by a single member of the BIA should not be accorded Chevron deference" (that is, deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)). Thus, the nonprecedential decision in Luna Torres's case cannot, under *Rotimi*, have been what the Second Circuit was deferring to in its opinion. Deference was evidently given to *Matter of Bautista* itself, and yet one might reasonably ask why the Second Circuit should have felt itself bound to defer to a precedential decision that had already been vacated by another Court of Appeals.

The general rule, as has been recognized by the Second Circuit and by other courts, is that "vacatur dissipates precedential force," *In re: Bernard Madoff Inv. Securities LLC*, 721 F.3d 54, 68 (2d Cir. 2013). That is, "vacated opinions are not precedent." *Asgeirsson v. Abbott,* 696 F.3d 454, 459 (5th Cir. 2012). Or, as the Ninth Circuit has put it more emphatically, "a decision that has been vacated has no precedential effect whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (emphasis in original). These opinions referred to the vacating of a federal court decision, not the vacating of a BIA decision, but logically the principle should apply to a vacated BIA decision as well.

To vacate, after all, has been defined as "to annul; to cancel or rescind; to render an act void; as, to vacate an entry of record, or a judgment." *Matter of Bautista* was annulled, was cancelled, was rescinded, by the Court of Appeals for the Third Circuit, in a case over which that Court properly had jurisdiction. It was, one might say, dead, having been killed by a competent authority. And yet, the Second Circuit in *Luna Torres* deferred to the BIA's vacated decision in *Matter of Bautista* as a precedent nonetheless—perhaps because the argument was not made that it ought not do so. One might refer to *Matter of Bautista,* under such circumstances, as a zombie precedent, one which has risen from the grave to walk the earth again even after being killed.

To be sure, a vacated decision can under some circumstances have "persuasive authority" even though it is not binding. *Brown v. Kelly*, 609 F.3d 467, 477 (2d Cir. 2010). The analog of such persuasive authority in the context of a BIA decision under review by a Court of Appeals, however, would be not *Chevron* deference, but the more limited form of deference given under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to an administrative opinion with the "power to persuade," *Skidmore*, 323 U.S. at 140, which some Courts of Appeals have found

applicable to non-precedential BIA decisions, as in *Ruiz-Del-Cid v. Holder*, 765 F.3d 635 (6th Cir. 2014), *Siwe v. Holder*, 742 F.3d 603, 607 (5th Cir. 2014), and *Latter-Singh v. Holder,* 668 F.3d 1156, 1160 (9th Cir. 2012). (The Second Circuit has reserved the question whether unpublished, non-precedent BIA opinions are even entitled to *Skidmore* deference, for example in *Mei Juan Zheng v. Holder*, 672 F.3d 178, 186 n.4 (2d Cir. 2012).) Even if a zombie precedent still walks the earth in some form, therefore, it should not have the same force and effect as a precedential opinion that has not been vacated, killed, by a Court of Appeals.

The somewhat obscure question of whether certain arson crimes constitute aggravated felonies is far from the only context in which zombie precedents play a significant role in immigration law. The decision of former Attorney General Michael Mukasey in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), for example, which altered the long-standing approach for determining whether certain convictions qualified as crimes involving moral turpitude, was vacated by the Court of Appeals for the Fifth Circuit in *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014). The American Bar Association has written a letter to Attorney General Eric Holder urging him to withdraw *Matter of Silva-Trevino*, but Attorney General Holder appears content to let the process play out in the Courts of Appeals. (Now that Attorney General Holder has announced his impending resignation, we may eventually get to see whether his successor feels differently.) So for the moment, under the BIA's conventional practice, *Matter of Silva-Trevino* would continue to govern in the circuits whose Courts of Appeals have not yet specifically rejected it. Although vacated by the Fifth Circuit, *Matter of Silva-Trevino* may continue its existence as a zombie precedent. If the Second Circuit, in a future case, were to address an unpublished BIA opinion purporting to rely on *Matter of Silva-Trevino*, one might expect, based on the Second Circuit's decision in *Luna-Torres*, that the Second Circuit would continue to defer to the rule of *Matter of Silva-Trevino* despite that precedent's zombie status, rather than refusing under *Rotimi* to give Chevron deference to the unpublished opinion which had purported to rely on *Matter of Silva-Trevino*. One might also hope, however, that the Second Circuit would handle the matter differently, if an alternative possibility were brought to its attention.

There is indeed an alternative to respecting zombie precedents, which would still allow the BIA to perform its functions as an administrative agency entitled generally to Chevron deference, while giving more appropriate weight to the

actions of a Court of Appeals that has overturned a precedent decision despite such deference. As discussed in Burning Down the House, the Second Circuit could in *Luna Torres* have vacated the nonprecedential decision in Luna Torres's case and remanded to the BIA for the issuance of a precedential decision, just as it had vacated the nonprecedential BIA decision in *Rotimi* and remanded for the issuance of a precedent decision. The Court of Appeals would thereby have said to the BIA, in effect, that it should, in light of the Third Circuit's decision in *Bautista*, issue a new precedential decision, *Matter of Luna Torres.* The BIA could then have determined in this new decision not only whether it continued to stand by its reasoning from *Matter of Bautista* in light of the Third Circuit's contrary reasoning, but whether it was troubled by the prospect of its ruling being valid only in some judicial circuits but not others, and whether it might therefore find it appropriate to acquiesce in the Third Circuit's ruling in the interest of national uniformity. It does not appear that this possibility was considered by the Second Circuit in *Luna Torres*.

It is not as though the BIA's action, when presented with such a choice, would necessarily be foreordained. Admittedly, the BIA has in some instances made a precedential choice to reaffirm the reasoning of a prior precedent even after its rejection by multiple circuits. In *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012), for example, the BIA reaffirmed *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), after its holding regarding the ineligibility of certain Lawful Permanent Residents for waivers of inadmissibility under INA §212(h) had been rejected by multiple Courts of Appeals, and indicated that *Koljenovic* would continue to be followed in circuits that had not rejected it. However, in some instances, the BIA has also been known to reverse course following rejection of its precedent by one or more Courts of Appeals.

In *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976), for example, the BIA acquiesced in the Second Circuit's decision in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), regarding the availability of relief under former INA §212(c) to certain lawful permanent residents who had not departed from the United States following a criminal conviction. In so doing, the BIA declined to follow its own earlier contrary decision in *Matter of Arias-Uribe,* 13 I&N Dec. 696 (BIA 1971).

Similarly, in *Matter of Marcal Neto*, 25 I&N Dec. 169 (BIA 2010), the BIA overruled *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), which had barred Immigration Judges from evaluating the continuing validity of an I-140 petition following the exercise of portability under INA §204(j), after the rejection of

Perez Vargas by several Courts of Appeals. *Matter of Perez Vargas* had by that time been vacated by the Court of Appeals for the Fourth Circuit in *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007), and thus was already what I have called a zombie precedent. The conventional view would say that Courts of Appeals should have deferred to *Matter of Perez-Vargas* until *Matter of Marcal Neto* was decided; I would argue that after *Perez-Vargas v. Gonzales* was decided, unpublished decisions relying on *Matter of Perez Vargas* were no longer entitled to deference, since *Matter of Perez Vargas* itself no longer existed. In the end, the BIA did decide to retreat from its zombie decision and adopt the view of the Court of Appeals for the Fourth Circuit (as well as other Courts of Appeals that had addressed the matter).

In some cases, the BIA might, after a Court of Appeals decision rejecting its analysis of an issue, find some third approach that incorporated the wisdom of the Court of Appeals decision without following it exactly. In *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011), for example, the BIA overruled *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), in part following its rejection by some circuit Courts of Appeals. The BIA in *Matter of Alyazji* did not entirely adopt the theory of those Courts of Appeals that an adjustment of status was simply not an "admission" for purposes of determining deportability under INA §237(a)(2)(A)(i) for conviction of a crime involving moral turpitude committed within five years after the date of admission. The BIA in *Alyazji* accepted a similar result in most contexts and retreated from *Shanu*, however, by holding that the date of admission for purposes of INA §237(a)(2)(A)(i) deportability was "the date of the admission by virtue of which the alien was present in the United States when he committed his crime"—so that the clock would run from a prior admission as a nonimmigrant that had been followed by an adjustment of status, and would not restart anew from the adjustment of status, unless the person being adjudged deportable had adjusted status after entering the United States without inspection (and thus had no prior admission by virtue of which he was present in the United States at the time). Here as well, therefore, the BIA did not simply insist that it would adhere to a prior precedent decision until that precedent decision was rejected by every Court of Appeals or by the Supreme Court, in the way that the conventional view of what I have called zombie precedents seems to suggest.

In a case where the zombie precedent was originally decided by an Attorney General, it seems even less likely that the BIA would continue to follow it in a

precedential decision if informed by a Court of Appeals that it had that option. *Matter of Silva-Trevino* was a departure by former Attorney General Michael Mukasey from many years of BIA precedent, and there is no apparent reason that the BIA, or current Attorney General Eric Holder, or his successor, should be so enamored of *Silva-Trevino* following its rejection by multiple Courts of Appeals as to insist on it in a new precedential decision. A refusal by Courts of Appeals to defer to *Matter of Silva-Trevino* as a zombie precedent, unless its reasoning were reaffirmed in a precedent decision made free of the original decision's binding force, might therefore hasten its demise substantially.

We know from fiction such as The Walking Dead and Night of the Living Dead that zombies are not, ordinarily, thought to be especially appealing or worthy beings. For the reasons explained in this blog, zombie precedents should be given no more respect. If the BIA wants courts to defer to the reasoning of a precedent decision that has already been given a proper burial by a Court of Appeals, the BIA should be required to afford that reasoning new life through a new precedent decision, which gives proper consideration to the contrary views of the Court of Appeals that vacated the original decision and explains why those contrary views have been disregarded.