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ZOMBIE PRECEDENTS, THE SEQUEL: HOW RECENT DECISIONS OF THE SECOND CIRCUIT AND THE BIA POINT TO A BETTER WAY OF DEALING WITH PRECEDENT DECISIONS THAT HAVE BEEN VACATED BY A COURT

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In my October 2014 post 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, I discussed why such vacated "zombie precedents" should not be given deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by Courts of Appeals that address subsequent unpublished BIA decisions purporting to rely on them. Recent decisions of the Court of Appeals for the Second Circuit and of the Board of Immigration Appeals ("BIA") provide additional support for that suggestion.

On April 9, 2015, the Court of Appeals for the Second Circuit issued its opinion in *Lugo v. Holder*. In that case, Ms. Lugo disputed whether her 2005 conviction for misprision of a felony under 18 U.S.C. §4 constituted a crime involving moral turpitude ("CIMT"). She had been found barred from cancellation of removal based on the Immigration Judge's ruling that misprision was indeed a CIMT, as the BIA had held in *Matter of Robles-Urrea*, 24 I&N Dec. 22 (BIA 2006). The BIA had affirmed the Immigration Judge's ruling in an unpublished decision.

As the Second Circuit discussed in *Lugo*, the BIA had originally held in *Matter of Sloan*, 12 I&N Dec. 840 (A.G. 1968; BIA 1966) that misprision of felony was not a CIMT. In *Matter of Robles-Urrea*, however, the BIA agreed with the decision of the Eleventh Circuit in *Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002), to the effect that misprision of felony under 18 U.S.C. §4 was in fact a CIMT, and

overruled *Matter of Sloan* in relevant part. Subsequently, the Court of Appeals for the Ninth Circuit vacated *Matter of Robles-Urrea* in *Robles-Urrea v. Holder*, 678 F.3d 702 (9th Cir. 2012), and held that misprision of felony was not categorically a CIMT. (The complicated history of the case law regarding whether misprision of felony is a CIMT was also discussed in Cyrus D. Mehta's March 2014 post on this blog, Was the Attorney Really Ineffective in *Kovacs v. United States?*.)

The Second Circuit therefore held in *Lugo* that it was "left to wonder whether, going forward, the Board wishes to adopt the Ninth Circuit's rule or the Eleventh Circuit's." *Lugo*, slip op. at 3-4. It concluded that "it is desirable for the Board to clarify this matter in a published opinion." *Lugo*, slip op. at 4. The Second Circuit remanded to the BIA to enable to answer both this question and a related question regarding retroactivity: that is, whether *Matter of Robles-Urrea* could appropriately be applied to Ms. Lugo even if the BIA otherwise wished to follow it, given that Ms. Lugo had pled guilty prior to the issuance of that published opinion.

One way to look at what the Second Circuit did in the first portion of its remand in *Lugo* is as an admirable refusal to defer to a zombie precedent. Having been vacated by the Ninth Circuit in *Robles-Urrea v. Holder*, the BIA decision in *Matter of Robles-Urrea* fits the description of a zombie precedent as discussed in my post The Walking Dead. It had been cancelled, rescinded, by a competent court, and thus, since "vacatur dissipates precedential force," *In re: Bernard Madoff Inv. Securities LLC*, 721 F.3d 54, 68 (2d Cir. 2013), it was properly seen as "not precedent." *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir. 2012). The non-precedent decision in Lugo's own case, meanwhile, was not entitled to deference because, as the Second Circuit had previously held, in *Rotimi v. Gonzales*, 473 F.3d 55, 56 (2d Cir. 2007), "a nonprecedential decision by a single member of the BIA should not be accorded *Chevron* deference." The Second Circuit therefore properly vacated the nonprecedential decision in Lugo's case and remanded to the BIA for the issuance of a precedential decision. That is, the Second Circuit did in *Lugo* essentially what I had suggested in The Walking Dead, and earlier in Burning Down the House: The Second and Third Circuits Split on Whether Arson Not Relating to Interstate Commerce is an Aggravated Felony, that it should have done in *Luna Torres v. Holder*, No. 13-2498 (August 20, 2014). Hopefully, this may be the start of a trend of Courts of Appeals not deferring to zombie precedents, but instead remanding to the BIA for further precedential analysis of whether the BIA wishes to follow in the footsteps of a

prior precedent decision vacated by another Court of Appeals, or instead wishes to accede to the Court of Appeals decision which vacated that prior precedent.

The Second Circuit's decision in *Lugo* is not the only recent development that I would submit gives support to my previously expressed views regarding zombie precedents. As discussed in my prior post, the BIA has been known to reverse course and abandon a precedent following its rejection by one or more Courts of Appeals. Earlier examples included *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976), where 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)) rather than insisting on its own contrary decision in *Matter of Arias-Uribe*, 13 I&N Dec. 696 (BIA 1971), and *Matter of Marcal Neto*, 25 I&N Dec. 169 (BIA 2010), where the BIA overruled *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005) (regarding the exercise of portability under INA §204(j) in immigration court proceedings), after its rejection by several Courts of Appeals, including the Court of Appeals for the Fourth Circuit in *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). I acknowledged in The Walking Dead that 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, and gave as an example *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012): in that case, 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. The BIA has now changed its mind on that point.

In *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015), decided on May 12, the BIA withdrew *E.W. Rodriguez* and *Koljenovic* in light of the rejection of the theory underlying them by nine Courts of Appeals. The immigration court proceedings in *Matter of J-H-J-* had taken place within the jurisdiction of the Court of Appeals for the Eighth Circuit, which had, in *Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014), accepted the BIA's reasoning in *E.W. Rodriguez* and *Koljenovic* as a reasonable interpretation of the statute. Thus, the BIA was free to reaffirm *E.W. Rodriguez* and *Koljenovic* in the case if it so wished. However, given "the overwhelming circuit court authority," *Matter of J-H-J-*, 26 I&N Dec. at 564, and the importance of "uniformity in the application of the immigration laws", *id.* at 565 (citing *Matter of Small*, 23 I&N Dec. 448, 450 (BIA 2002)), the BIA instead held

that "section 212(h) . . . only precludes aliens who entered the United States as lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction." *Matter of J-H-J-*, 26 I&N Dec. at 565.

Strictly speaking, *E.W. Rodriguez* and *Koljenovic* were not zombie precedents as I have defined that term, never having been themselves vacated by a court. However, the BIA's overruling of those precedents in *Matter of J-H-J-* is, like *Matter of Silva* and *Matter of Marcal Neto* before it, an example of the BIA's willingness to reconsider its own precedent in light of contrary appellate case law from outside the circuit having appellate jurisdiction over the case at hand.

Against this background, it makes increasingly little sense for courts to implicitly assume that the BIA would necessarily insist on following in the footsteps of a precedent decision which has already been vacated by a Court of Appeals. Rather than giving deference to a zombie precedent, the Courts of Appeals should remand to the BIA for reconsideration of whether it wishes to follow in the footsteps of that precedent, as the Second Circuit did in in *Lugo*.