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US IMMIGRATION & NATIONALITY LAW

UNITED STATES V. HANSEN: SUPREME COURT ONCE AGAIN AGREES TO HEAR CONSTITUTIONALITY OF A SMUGGLING STATUTE THAT COULD IMPACT IMMIGRATION LAWYERS

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On December 9, 2022, the Supreme Court granted certiorari in *United States v. Helaman Hansen*, a case that poses the question whether the federal criminal prohibition on encouraging or inducing unlawful immigration for commercial advantage or private financial gain in violation of INA §274(a)(1)(A)(iv) is unconstitutionally overbroad. Helaman Hansen ran an organization called Americans Helping America Chamber of Commerce ("AHA") that purported to help undocumented immigrants become U.S. citizens through adult adoption. Hansen falsely advised these individuals that many undocumented immigrants had successfully become U.S. citizens through his program. In reality, it is not possible to obtain U.S. citizenship through adult adoption. Hansen was convicted of several counts of fraud in California, and was found to have violated INA §274(a)(1)(A)(iv) because he encouraged or induced individuals who participated in his program to overstay their visas on two occasions. He first moved to dismiss the two fraud counts that were based on a violation of INA INA §274(a)(1)(A)(iv) on the ground that this provision is facially overbroad, void for vagueness, and unconstitutional as applied to him, but the district court denied his motion.

Hansen then appealed to the Ninth Circuit, arguing in relevant part that INA §274(a)(1)(A)(iv) is facially overbroad under the First Amendment. The government argued that that subsection (iv) was limited to speech integral to criminal conduct, specifically solicitation and aiding and abetting. The Ninth

Circuit disagreed, holding that the provision prohibits a broad range of protected speech. One could violate 8 U.S.C. § 1324(a)(1)(A)(iv) merely by "knowingly telling an undocumented immigrant 'I encourage you to reside in the United States'", the court reasoned. The court held INA §274(a)(1)(A)(iv) is unconstitutionally overbroad, and reversed Hansen's convictions under this provision. The government is seeking review of the Ninth Circuit's decision at the Supreme Court, arguing in part that it has historically construed the "encourage" or "induce" language of INA §274(a)(1)(A)(iv) very narrowly to prosecute those who engaged in serious criminal conduct.

The same First Amendment overbreadth argument at issue in *Hansen* was addressed two years ago in *United States v. Evelyn Sineneng-Smith*. We discussed this case at length in a previous blog, excerpts of which are reproduced here. *United States v. Evelyn Sineneng-Smith* involved an unauthorized practitioner who operated an immigration consulting firm in San Jose, California. Sineneng-Smith represented mostly natives of the Philippines who were unlawfully employed in the home health care industry and who sought to adjust their status to permanent residence through the filing of a labor certification by an employer. These clients were not eligible to apply for adjustment of status in the United States under INA § 245(i) which expired on April 30, 2001 and they also did not appear to be grandfathered under this provision. Although Sineneng-Smith knew that her clients were not eligible under 245(i), she continued to sign retainer agreements with them and tell them that they could apply for green cards in the United States. At least two of the clients testified that they would have left the country if they were advised that they were not eligible to apply for permanent residence.

Sineneng-Smith was convicted by a jury on two counts of encouraging and inducing an alien to remain in the United States for the purposes of financial gain, in violation of INA §274(a)(1)(A)(iv) and INA §274(a)(1)(B)(i). She was also convicted on two counts of mail fraud in violation of 18 U.S.C. §1341. The Ninth Circuit reversed her convictions under INA §274(a)(1)(A)(iv) and INA §274(a)(1)(B)(i) on the ground that "encourage" and "induce" under their plain meaning restrict vast swaths of protected expression in violation of the First Amendment despite the government countering that the statute only prohibits criminal conduct and a narrow band of unprotected free speech. The court provided several examples of seemingly innocuous conduct that could constitute a criminal violation of the provision, including one that is especially

troubling for immigration lawyers - an attorney telling her client that she should remain in the country while contesting removal, because, for example, non-citizens within the United States have greater due process rights than those outside the United States, and because as a practical matter, the government may not physically remove her until removal proceedings have been completed. The Supreme Court ultimately dismissed the case on other grounds, particularly for having departed from the party presentation principle.

It remains to be seen how the Supreme Court rules in *Hansen*, but its decision could carry important implications for immigration lawyers. Given the striking breadth of INA §274(a)(1)(A)(iv), a lawyer telling an undocumented client simply "I encourage you to remain in the United States" – perhaps because the client would later become eligible to seek adjustment of status – could render her vulnerable to prosecution. The Ninth Circuit in *Hansen* provided numerous other examples of protected speech that could potentially be prosecutable according to the plain text of the statute, including encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants.

The Ninth Circuit considered a case that illustrates how easily an immigration lawyer could violate INA §274(a)(1)(A)(iv) by discussing even general immigration policies and consequences with undocumented clients. In *United States v. Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012), the government prosecuted a U.S. Customs and Border Patrol supervisor under this provision for "advis cleaning lady generally about immigration law practices and consequences." 857 F. Supp. 2d at 193. As Judge Bumatay points out in his dissent of the Ninth Circuit's decision denying an en banc hearing, the conduct at issue in *Henderson* may be more egregious than it first appears – the CBP supervisor knowingly engaged an undocumented employee and "coach the employee on how to evade immigration authorities while residing in the country". Still, the majority in *Hansen* cited the example of Henderson being prosecuted for advising her cleaning lady about immigration law practices and consequences, and thus "makes plain the ability of subsection (iv) to chill speech." While the government has maintained that it will use INA §274(a)(1)(A)(iv) to prosecute persons who engage in the sort of criminal conduct that Hansen engaged in, this broad provision could also allow an

overzealous prosecutor to go after a well meaning worker in a nonprofit who encourages an undocumented immigrant to take shelter during a natural disaster.

In the absence of clarity on how INA §274(a)(1)(A)(iv) could be applied to immigration lawyers advising their clients, practitioners can refrain from expressly advising or encouraging clients to remain in the U.S. in violation of the law, and instead outline both the adverse consequences and potential benefits of this course of action to clients. Immigration lawyers should also keep in mind that ABA Model Rule 1.2(d), which has analogs in many state rules of professional responsibility, states that " lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." While it may be unlikely that an immigration lawyer advising an undocumented client to remain in the United States in order to become eligible for an immigration benefit down the road would be prosecuted under INA §274(a)(1)(A)(iv), but presenting the general consequences and benefits of remaining in the U.S. in violation of the law, as well as staying within the confines of ABA Model Rule 1.2(d), can offer practitioners some guidelines for avoiding potential liability.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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