CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

FLEUTI LIVES! THE RESTORATION OF A CONSTITUTIONAL DECISION

Posted on April 9, 2012 by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

There was a time when a lawful permanent resident (LPR) or green card holder had more rights than today.

Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), if an LPR with a criminal conviction travelled abroad, he or she was not found inadmissible, or excludable as it was then known, if the trip was brief, casual and innocent.

This was as a result of a landmark decision of the Supreme Court, *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Fleuti, an LPR and Swiss national, was found excludable after he returned from a visit to Mexico of only about a couple of hours under the then exclusion ground of being an alien "afflicted with psychopathic personality" based on his homosexuality. This was only an excludable and not a deportable ground. If Flueti had not departed the US, he would not have been in the predicament he was in after his brief trip to Mexico. The Supreme Court interpreted a then statutory provision involving involuntary departures not resulting in an entry into the US, INA §101(a)(13), to hold that Congress did not intend to exclude long term residents upon their return from a trip abroad that was "innocent, causal and brief."Thus, under the *Fleuti* doctrine, such an LPR was not thought to have left the US so as to trigger excludability.

In 1996, IIRIRA amended § 101(a)(13), which now provides:

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien —

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of

the alien from the United States, including removal proceedings under this Act and

extradition proceedings,

(v) has committed an offense identified in section 212(a)(2), unless since such offense

the alien has been granted relief under section 212(h) or 240A(a), or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

The Board of Immigration Appeals in *Matter of Collado-Munoz*, 21 I&N Dec. 1061 (BIA 1998), interpreted this amendment as eliminating the *Fleuti* doctrine. Thus, post 1996, an LPR who was convicted of a crime involving moral turpitude (CIMT) and who travelled abroad would be seeking admission in the US under new § 101(a)(13)(C)(v) and could be put on the same footing as any alien seeking admission who may not have the same long term ties to the US as the LPR. Such an LPR would be found inadmissible of that CIMT even if that crime did not trigger removability had he or she not left the US. The BIA eliminated the *Fleuti* doctrine despite a long line of Supreme Court cases holding that returning LPRs were entitled to the same due process rights as they would have if they were placed in deportation proceedings. For instance, in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), involving a seaman LPR whose entry was deemed prejudicial to the public interest and who was detained at Ellis Island as an excludable alien, the Supreme Court held that we must first consider what would have been his constitutional rights had he not undertaken his voyage to foreign ports but remained continuously in the US. Even in *Landon v. Plasencia*, 459 U.S. 21 (1982), where the LPR's trip abroad involved a smuggling operation and was not considered so innocent, the Supreme Court held that

she could seek the *Fleuti* exception even in exclusion proceedings as well as enjoy all the due process rights as an LPR. *Landon* recognized the LPR's long term ties with the country noting that her right to "stay and live and work in this land of freedom" was at stake along with her right to rejoin her family. It seemed that the BIA in *Matter of Collado-Munoz*, an administrative agency, was limited by its inability to rule upon the constitutionality of the laws it administered despite the robust dissent of Board Member Rosenberg who stated that "e are, however, authorized and encouraged to construe these laws so as not to violate constitutional principles." Circuit courts deferred to the BIA interpretation while "recognizing that there are meritorious arguments on both sides of the issue." *See Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003).

As a result after IIRIRA, LPRs with prior convictions who travelled abroad briefly for holidays, weddings or to visit sick relatives were found inadmissible upon their return, and were also detained under the mandatory detention provision pursuant to § 236(c) if the conviction was a CIMT. This was true even if the conviction occurred prior to 1996 when *Fleuti* existed. In January 2003, Vartelas, an LPR, returned from a week- long trip to Greece, and immigration officials at the airport determined he was an alien seeking admission pursuant to § 101(a)(13)(c)(v) as he was convicted in 1994 for conspiring to make counterfeit security, which was characterized as a CIMT. Vartelas challenged his designation as an arriving alien seeking admission all the way to the Supreme Court, and in *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, U.S. LEXIS 2540 (March 28, 2012), the Supreme Court recently held that the *Fleuti* doctrine still applies to LPRs with pre-IIRIRA convictions who travel abroad. Noting that there was a presumption against retroactive legislation under *Langraf v. USI film Products*, 511 U.S. 244 (1994), the Supreme Court concluded that INA § 101(a)(13)(C)(v) resulted in an impermissible retroactive effect as it created a "new disability" to conduct completed prior to IIRIRA's enactment in 1996. This new disability was Vartelas' inability to travel after 1996, which he could freely do so prior to 1996. The *Vartelas* court noted, "Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas now face potential banishment." We refer you the excellent practice advisory of the Legal Action Center of the American Immigration Council on how to represent clients with pre-1996 convictions who have been positively impacted by *Vartelas v. Holder.*

Not all share our view of *Vartelas v. Holder. O*ne expert commentator limits it to LPRs with pre-1996 convictions, and for this reason predicts that it will not have a broad impact.

We think differently. Although the Supreme Court passed up the opportunity to rule on the viability of *Fleuti* for post 1996 convictions; in footnote 2 while acknowledging that the BIA read INA §101(a)(13)(C) to overrule *Fleuti* the Court noted, "Vartelas does not challenge the ruling in *Collado-Munoz*. We therefore assume, but do not decide, that IIRIRA's amendments to §101(a)(13)(A) abrogated *Fleuti*." This is significant since the Supreme Court explicitly did not affirmatively decide that *Fleuti* had been repealed for LPRs who had convictions after the enactment of IIRIRA. Practitioners with have LPR clients who have been charged as arriving aliens after a brief trip abroad should continue to advocate for the viability of the *Fleuti* doctrine on behalf of their clients in removal proceedings.

There are compelling arguments for doing so, and we commend readers to the brilliant amicus brief that Ira Kurzban and Debbie Smith wrote for the American Immigration Lawyers (AILA) Association in *Vartelas v. Holder* providing suggestions on how to convincingly make them. The key argument is that that the §101(a)(13)(C) categories never abrogated *Fleuti*; rather they codified some of the characteristics of *Fleuti* by suggesting, for example, that an LPR would not be seeking admission if the trip overseas was brief (§101(a)(13)(C)(ii)) and that it was innocent (§101(a)(13)(C)(iii)). Moreover, § 101(a)(13)(C) employs "shall not …unless" language, which suggests that the provisions within are only necessary conditions to trigger inadmissibility, but not necessary and sufficient conditions to trigger inadmissibility.

Moreover, the burden has always been on the government to establish that an LPR is not entitled to that status, and this burden established in *Woodby v. INS*, 385 U.S. 276 (1966), is that the government must prove by "clear, unequivocal and convincing" evidence that the LPR should be deported. Subsequent to *Woodby*, in *Landon v. Plasencia, supra,* the Supreme Court held that a returning resident be accorded due process in exclusion proceedings and that the *Woodby* standard be applied equally to an LPR in exclusion proceedings. With the introduction of the § 101(a)(13)(C) provisions rendering a returning LPR inadmissible, the CBP's Admissibility Review Office and more than one government lawyer argued that the heavy burden of proof that the government had under *Woodby* had shifted to the LPR. Indeed, INA §240(c)(2) places the

burden on the applicant for admission to prove "clearly and beyond doubt" that he or she is not inadmissible. Fortunately, a recent decision of the BIA in *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) shatters this assumption once and for all. The BIA by affirming the *Woodby* standard in *Rivens* held, "Given this historical practice and the absence of any evidence that Congress intended a different allocation of standard of proof to apply in removal cases arising under current section 101(a)(13)(C) of the Act, we hold that the respondent – whose lawful permanent resident status is uncontested – cannot be found removable under the section 212(a) grounds of inadmissibility unless the DHS first proves by clear and convincing evidence that he is to be regarded as an applicant for admission in this case by having "committed an offense indentified in section 212(a)(2)." It is surprising that Justice Ginsburg did not mention *Rivens* although footnote No. 1 in that decision reveals that the BIA was keenly attuned to what the Supreme Court might do with the *Vartelas* case.

Thus, the survival of *Woodby*, notwithstanding the enactment of §101(a)(13)(C), carries with it the survival of *Fleuti*. Even though the *Vartelas* Court did not have to decide if *Fleuti* still lived, it reminds us that, despite the failure of the BIA to realize it in *Collado-Munoz*, *Fleuti* is at heart a constitutional decision. *Vartelas* belongs in this same line of cases because it too emphasizes the special protection that the Constitution offers to returning LPRs. The portion of *Vartelas* that could serve as a springboard for such an argument in a future case is part of footnote 7of the slip opinion:

"The act of flying to Greece, in contrast, does not render a lawful permanent resident like Vartelas hazardous. Nor is it plausible that Congress' solution to the problem of dangerous lawful permanent residents would be to pass a law that would deter such persons from ever leaving the United States."

The authors credit David Isaacson for pointing that the second sentence, in particular, suggests a potential willingness to avoid reading 101(a)(13)(C)(v) in the way that *Collado-Munoz* did, essentially on the ground that such a reading makes no sense because of its logical consequence. One might be able to combine this with the constitutional concerns raised in the AILA amicus brief and get Collado-Munoz overturned (and *Fleuti* restored) on the basis of a combination of purpose-based ambiguity in the statute and the doctrine of avoidance of constitutional doubts, which trumps *Chevron* deference, see, e.g., *Edward J. DeBartolo Corp. v. Florida Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 574-575 (1988). The effect would be analogous to *Zadvydas v. Davis*, 533

U.S. 678 (2001) where the statute was found ambiguous largely because of concerns relating to its purpose and then interpreted in the manner that would not raise serious constitutional concerns. To the authors, this places *Vartelas* in a much larger context where the full potential of the ruling may be examined and developed in the future.

The significance of *Vartelas* is not limited to returning permanent residents with pre-1996 convictions. Rather, when viewed with a wide-angle lens, it may serve as the ruling that restores *Fleuti* as a constitutional decision. Unlike the assumption of the BIA in *Collado-Munoz* that *Fleuti* was decided in what Ira Kurzban and Deborah Smith insightfully term a "constitutional vacuum," Justice Ginsburg has given back to *Fleuti* the constitutional provenance that sadly it seemed to have lost.Unlike the Fifth Circuit in *De Fuentes v. Gonzalez, 462 F.3d 498,503(5th Cir. 2006)* that saw no "constitutional core" in *Fleuti* or the Third Circuit in *Tineo v. Ashcroft, 350 F.3d 382,397 (3d Cir 2003)* which boldly though mistakenly proclaimed that Fleuti had no basis in constitutional principle, *Vartelas* harkens back to an appreciation of lawful permanent residence that IIRIRA made us think for a while had vanished: "Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Landon v. Plascencia, 459 US at 32 (citing Johnson v. Eisentrager, 339 US 763, 770(1950)).* If that happy day comes when *Fleuti* is restored in full, legal scholars may well look back to *Vartelas v Holder* as the case that made it all possible*. The lasting contribution to the law that the Supreme Court has made through Vartelas v Holder* may well be not only, or even primarily, in its forthright rejection of IIRIRA retroactivity, but rather in reclaiming for *Fleuti* its lasting place in the penumbra of constitutional safeguards that have nurtured and protected the rights of lawful permanent residents. In this sense, *Fleuti* did not create new rights for permanent residents so much as refine and expand existing constitutional alliances. For this reason, a revival of *Fleuti* would not be a radical leap into terra incognita but the rightful restoration of a constitutional regime that commands our attention and merits our respect. We do not know what the future will be for *Fleuti* but, now, thanks to *Vartelas,* there might be a story to tell.