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US IMMIGRATION & NATIONALITY LAW

WHAT THE THIRD CIRCUIT MISSED IN VERA, PART TWO: A PRACTICAL EXAMPLE OF WHY ACCEPTING UNREFUTED BUT UNSUPPORTED GOVERNMENT ASSERTIONS IS PROBLEMATIC

Posted on July 2, 2012 by David Isaacson

In a previous post on this blog, "The Prejudice Caused By Summary Removal After Visa Waiver Admission: What the Third Circuit Missed in Vera and Bradley", I discussed the case of *Vera v. Attorney General of the U.S.*, in which the U.S. Court of Appeals for the Third Circuit held that a woman who had entered the United States at the age of 12 under the Visa Waiver Program (VWP) could be removed without a hearing before an immigration judge, even though the government could not produce proof that she had actually waived her right to such a hearing. The Third Circuit in Vera relied on a presumption that the waiver must have been properly executed since this was required by statute in order for Ms. Vera to be admitted under the VWP, and also on the argument, first accepted by the Third Circuit in the case of *Bradley v. Attorney General of the U.S.*, 603 F.3d 235 (3d Cir. 2010), that there was no prejudice to Ms. Vera from any lack of a knowing and voluntary waiver because the summary removal that she now faced was the same consequence that she would have faced if she had refused to sign the waiver.

As explained in my previous blog post, the assertion of lack of prejudice that formed an important part of the Third Circuit's initial decision in Vera was based on an error. It has now become apparent that the presumption of a proper waiver in the Third Circuit's decision was also based on an error, one that helps illustrate why courts in the immigration context should be reluctant to indulge unproven executive-branch assertions about how something must have happened. The Third Circuit has now had to vacate its decision in Vera, because the government discovered that Ms. Vera actually was not admitted

under the VWP at all!

As discussed in a June 11 post on AILA's Slip Opinion blog, following the Third Circuiit's March 1 decision in her case, Ms. Vera secured pro bono counsel to represent her in a petition for rehearing en banc before the Third Circuit, and they in conjunction with the New York State Youth Leadership Council succeeded in getting her released from immigration detention in April after she had been detained for nine months. Then, as reported on May 21, 2012 by Ms. Vera's new pro bono counsel at the Heartland Alliance's National Immigrant Justice Center (NIJC) , to whom congratulations are due, the Department of Homeland Security (DHS) cancelled the removal order against Ms. Vera after belatedly realizing that Ms. Vera had not been admitted under the VWP, and the Office for Immigration Litigation (OIL) (federal court lawyers who represent DHS), filed a motion to throw out Vera's immigration case. On May 25, 2012, at the urging of Ms. Vera's new NIJC counsel, Ms. Vera was granted deferred action in the exercise of prosecutorial discretion. And in an order issued on June 13, 2012, the Third Circuit vacated its earlier decision in Vera and dismissed the case, because there was no longer any final order of removal and thus nothing for the Third Circuit to review.

In its June 13, 2012 order vacating its earlier decision, the Third Circuit stated: "The Court notes that it based its decision on the incorrect representation of the Department of Homeland Security that petitioner was admitted to the United States under the Visa Waiver Program and further notes that petitioner did not challenge this representation." The original March 1, 2012 decision had acknowledged that Ms. Vera "did not concede expressly that she entered the United States under the VWP" but concluded that the government's assertions, plus Ms. Vera's failure to contend otherwise, left the Court "satisfied" that such was the case:

In her opening brief in this Court, Vera did not concede expressly that she entered the United States pursuant to the VWP. But the government in its answering brief pointed out that Vera stated that she was admitted under the VWP in the Record of Sworn Statement that she executed when Immigration and Custom Enforcement officers took her into custody and that her father, in an affidavit submitted on her behalf, made the same representation. Though she had the opportunity in her reply brief to contest the government's representation of the contents of those documents she did not do so nor does she deny now that she entered the United States under the auspices of the

VWP. Moreover, she does not contend that she entered the United States on any basis other than under the VWP. In these circumstances, we are satisfied that she entered pursuant to the VWP. We also point out that there is no indication in the briefs or the record on the petition before us that she ever has left this country since the time of her entry.

Vera v. Att'y Gen., 11-3157 (3d Cir. March 1, 2012), slip op. at 4 n.3. That is, the Third Circuit concluded from the government's unchallenged descriptions of prior statements made by Ms. Vera and her father that Ms. Vera must have been admitted under the VWP, despite the lack of any documentation showing this to be true. This despite the fact that Ms. Vera was describing events that had happened more than 10 years ago, in September of 2000, when she was only 12 years old. Although hindsight is, to be sure, 20-20, it is problematic to expect someone to have definitive knowledge of what specific immigration-law provision she entered under many years ago during her childhood, and it is not that much better to rely on the recollection even of an adult layman regarding the legal details of an immigration-related event that occurred more than a decade ago.

One of the reasons that at our firm, and I suspect at most other firms practicing in the area of immigration law, prospective clients are asked to bring to the initial consultation any and all documents that may shed light on their immigration history, is that the vague recollection of a layperson regarding what formal program he or she may have entered under some time ago, and what may have happened since, is not particularly likely to be reliable when it is not backed up by documentation. Immigration law is incredibly complex. In softcover book form, the Immigration and Nationality Act alone is nearly four hundred pages long, and the related Title 8 of the Code of Federal Regulations is more than one thousand pages in length. There are also other federal regulations that relate to immigration law, various administrative handbooks of different agencies (such as the State Department's Foreign Affairs Manual, or the Adjudicator's Field Manual and Inspector's Field Manual of U.S. Citizenship and Immigration Services and Customs and Border Protection respectively), and other government policy memoranda that will also sometimes need to be reviewed in order to determine precisely what has happened in a particular case. Moreover, not only the regulations and handbooks but the Immigration and Nationality Act itself can change frequently over time. The current version of the Visa Waiver Program, for example, was created by the Visa Waiver

Permanent Program Act in October 2000, as explained by a 2004 Congressional Research Service report (see page 9)– that is, the current version of the VWP was created by statute after Ms. Vera's September 2000 entry into the United States.

Because of the complicated nature of the immigration system as it exists today, and because of the equally convoluted history underlying today's version of the immigration system, a non-lawyer who has gone through the immigration process will often mistake one status or legal mechanism for another. In this field, fallible memory is often no substitute for actual paperwork. That is particularly so when one is trying to reconstruct events that happened more than a decade ago. While it is sometimes the case that one must rely on human memory because no paperwork was issued at the time of a particular admission (such as when a car is "waved through" at a border post, which is still an admission for purposes of adjustment of status as explained by the Board of Immigration Appeals in *Matter of Quilantan*), that is different from relying on memory when government paperwork should exist according to the government's theory of the case, but the government simply cannot find it.

The path taken by Ms. Vera's case demonstrates why it is problematic to assume the truth of facts not explicitly conceded by a particular noncitizen, in the absence of records showing the truth of those facts, simply because those facts appear most consistent with the orderly functioning of the immigration system and the noncitizen is not sure of their falsity. While it is perhaps understandable that the Court of Appeals for the Third Circuit chose to rely on facts confidently asserted by the government and seemingly not disputed by Ms. Vera or her then-counsel prior to the Court's original decision, the ultimate outcome of the case demonstrates that government assertions about someone's immigration status are not necessarily true just because the subject of the assertions cannot with assurance recognize them as false.

Immigration law is sufficiently complex that it is easy for laypeople and even government bodies to make mistakes. One important way to guard against a mistaken reconstruction of significant details of a case's history is to insist that the government prove its allegations are true, rather than merely assuming them to be true because an immigrant is unable to state with certainty that those allegations are false. Particularly when the right to a full and fair hearing regarding one's potential removal is at stake, the better approach, as the Court of Appeals for the Second Circuit held in *Galluzzo v. Holder*, 633 F.3d 111, 115

(2d Cir. 2011), quoting from Johnson v. Zerbst, 304 U.S. 458, 464 (1938), is to "indulge every reasonable presumption against waiver of fundamental constitutional rights." If the government cannot produce documentation proving that a particular person actually entered under the VWP and actually signed a valid waiver of her right to contest removal, then the government should not be permitted to remove that person without a hearing.