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HIZAM V. KERRY: IF THIS IS THE RIGHT RESULT UNDER CURRENT LAW, THEN THE LAW NEEDS TO BE CHANGED

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Imagine for a moment that, since you were nine, your parents had told you that you were a U.S. citizen. And not just told you: your father filed papers with the U.S. government, and obtained official proof of your citizenship. You grew up in the United States from age nine onward as a U.S. citizen, attended school and college here, and got a job here. Imagine further that more than twenty years later, the government suddenly told you that your parents had been wrong: you were not a U.S. citizen after all, and thus you had no right to be here.

Surely, you would think after recovering from your initial shock, this must be because your father did something improper back when you were a child. Perhaps he had been lying to the government, and to you, all along? Perhaps the papers he filed with the government to obtain proof of your citizenship were fraudulent? Surely he must have done something wrong, for the government to take away your citizenship after all these years. Surely they would not simply take away the citizenship you had always thought you had, unless there were some fault on your family's side.

But if that was what you thought, it is you who would be wrong. This is the story of Abdo Hizam, who the State Department decided in 2011 was not actually a U.S. citizen, even though they had repeatedly documented him as a citizen since 1990. According to the State Department, it was the government, not Hizam or his father, who made the mistake; and yet it is Hizam, not the government, who must pay the price. On March 12, 2014, the Court of Appeals for the Second Circuit, in the case of *Hizam v. Kerry*, ruled that the State Department was right, and that Hizam has no legal remedy.

Abdo Hizam was born in 1980. As recounted in a 2012 New York Times article, his father, a naturalized U.S. citizen, worked at that time at a Chrysler plant in Michigan, while his mother was living in Yemen. In 1990, as explained in the Second Circuit's opinion, Hizam's father submitted an application for a consular report of birth abroad ("CRBA") for his son, which even the government agrees was entirely truthful, and which was granted, documenting Hizam as a U.S. citizen. A CRBA has "the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction" according to 22 U.S.C. §2705.

Also in 1990, Hizam's maternal grandparents, who like his father lived in Michigan, visited Yemen and brought Hizam back to the United States. After moving to the United States with his grandparents, Hizam grew up here and built his life here. As the Second Circuit explained:

> *After receiving a CRBA and passport, Hizam traveled to the United States to live with his grandparents. Hizam attended elementary, middle and high school in Dearborn, Michigan. He became fluent in English and did well in school, where he was a member of his high school's swim team. Hizam began working while in high school, and worked two jobs to support himself while attending college in the United States. He graduated from Davenport University in 2003 with a degree in business administration. He eventually moved to the Bronx, New York, to live with his brothers. During his residence in the United States from 1990 through 2002, his passport was renewed twice without incident.*
> *In 2002, Hizam traveled to Yemen, where he married, and subsequently had two children. Between 2002 and 2009, Hizam traveled back and forth regularly between the United States and Yemen, where his wife and children reside. At the time he commenced this litigation, Hizam worked at the family business, Moe's Deli, in New York. He is the primary caretaker for one of his brothers, a minor, and is pursuing a master's in business administration at Mercy College.*

Hizam v. Kerry slip op. at 7.

When Hizam in 2009 sought to obtain CRBAs and U.S. passports for his own children, the State Department began a review of his citizenship status that

ended in the cancellation of his passport and CRBA on the ground that he was not a U.S. citizen. As the Second Circuit explained:

> *In 2009, Hizam applied for CRBAs and U.S. passports for his two children at the U.S. Embassy in Sana'a, Yemen. U.S. officials at the embassy told Hizam there was an issue with his passport, and retained his passport for about three weeks. After his passport was returned, Hizam returned to the United States. In April 2011, while Hizam was in the United States, the State Department notified him via letter that his CRBA and passport were wrongly issued "due to Department error." The letter stated that while "his error was evident from your CRBA application there is no indication that your father fraudulently obtained citizenship documentation for you," and "there is no evidence of fraud on your part." It concluded that "nfortunately . . . the Department of State lacks authority to create a remedy that would in some way confer U.S. citizenship on anyone absent a statutory basis for doing so." Subsequent letters from the Department of State informed Hizam that his CRBA had been cancelled, and his passport revoked, and requested that he return those documents, which he did in May 2011.*

Hizam v. Kerry slip op. at 8.

The problem, it appears, was that Hizam's father's CRBA application for him had been adjudicated based on the wrong version of the relevant statute. Generally, the law governing the acquisition of citizenship by a child is that in effect at the time of the child's birth. The law had changed between the time of Hizam's birth and the time that his father applied for his CRBA (in 1986 to be precise), however, and the consular officer seems to have applied the new version of the statute, in effect at the time of the application, rather than the old version, in effect at the time of Hizam's birth. To quote again from the Second Circuit's opinion:

> *Hizam's father truthfully stated in the application that he had arrived in the United States in 1973, and was physically present in the United States for approximately seven years at the time of Hizam's birth in October 1980. . . . .*

> *At the time of Hizam's birth, the child of a United States citizen born*

> *outside of the United States was eligible for citizenship if the parent was present in the United States for at least 10 years at the time of the child's birth. 8 U.S.C. § 1401(g) (Supp. III 1980). However, the law had changed by the time Hizam's father sought a CRBA on Hizam's behalf. The amended law required the parent to be present in the United States for just five years. 8 U.S.C. § 1401(g). It appears that the consular officer erroneously applied the five year rule in granting Hizam a CRBA.*

Hizam v. Kerry slip op. at 6-7.

Hizam sued for the return of his CRBA, and won in the district court, but was rebuffed at the Second Circuit. The Court of Appeals concluded that the statute authorizing the State Department to revoke CRBAs was not impermissibly retroactive, and, perhaps more startlingly, that the State Department's long delay in correcting its error, even though undeniably prejudicial to Hizam, did not entitle him to any remedy despite the compelling equities of his case. As the Court explained:

> *In the alternative, Hizam argues that the State Department should be precluded from revoking his CRBA under a laches theory, because the State Department unreasonably delayed revoking the CRBA, and Hizam was prejudiced by the undue delay. Laches is an equitable defense that requires proof of lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense. See Costello v. United States , 365 U.S. 265, 281 82 (1961). The State Department certainly lacked diligence in correcting its error, as the correction did not occur for 21 years, during which time Hizam used his CRBA to renew his passport twice. And Hizam was certainly prejudiced by the State Department's delay in correcting its error, because, as he delineates in his brief, there were several other avenues to citizenship that he could have pursued but are now foreclosed to him.*

> *The equities in this case overwhelmingly favor Hizam. Indeed, even the State Department recognizes "the considerable equities of his case." Despite sympathy for Hizam's position, however, we conclude that courts lack the authority to exercise our equitable powers to achieve a just result here. Well settled case law bars a court from exercising its equity*

> *powers to naturalize citizens. See Pangilinan , 486 U.S. at 885; Fedorenko v. United States , 449 U.S. 490, 517 (1981); Wong Kim Ark , 169 U.S. at 702. The courts lack authority to provide Hizam with the relief he seeks.*

Hizam v. Kerry slip op. at 20-21. The Court quoted the State Department's representation that it "has brought the matter to the attention of , and will continue to support other lawful means to provide relief to Hizam, including a private bill in Congress should one be introduced." *Id*. at 22. If no private bill is introduced, there is no obvious route back to citizenship or even lawful permanent residence for Hizam, absent further factual developments not evident from the Second Circuit decision.

It is worth pausing at this point to discuss some of the "several other avenues to citizenship" that the Court acknowledged Hizam "could have pursued but are now foreclosed to him." *Hizam v. Kerry* slip op. at 21. Had Hizam and his father been notified of the problem before Hizam turned 18, for example, Hizam's father could have sought expedited naturalization of his son under INA §322, 8 U.S.C. §1433. That provision, as it existed in the years before 2000, allowed a U.S. citizen parent to apply for expedited naturalization of a child if, among other things, the parent had been physically present in the United States for the period of five years, two after the age of fourteen, that would be required to transmit citizenship automatically to a child born after 1986. See See 8 U.S.C. §1433(a)(5) (1999). (Under current law, INA §322 applies only to children residing outside the United States with their U.S. citizen parents, likely because under INA §320, a child under the age of 18 who is residing inside the United States as a lawful permanent resident in the legal and physical custody of a U.S. citizen parent becomes a U.S. citizen automatically, without the need for a separate application other than to provide evidence of the status they have already come to possess.) Or, if the problem had been discovered after Hizam turned 18 but before he turned 21, his father could perhaps have sponsored him for lawful permanent residence as the immediate relative of a U.S. citizen. *See* INA §201(b)(2)(A)(i) (describing "children . . . of U.S. citizens") as immediate relatives; INA §101(b)(1) (describing a "child" in part as "an unmarried person under twenty-one years of age"). Now, however, neither of those options are available.

One small consolation for Mr. Hizam is that he likely qualifies as inspected and admitted to the United States, should he in the future, for example, enter into a

bona fide marriage with a U.S. citizen and seek adjustment of status under INA §245(a) as an immediate relative of that U.S. citizen. Under the rule of *Matter of F-*, 9 I&N Dec. 54 (Reg. Comm'r 1960, Asst. Comm'r 1960), one who innocently enters the United States under a claim of U.S. citizenship that turns out to be incorrect is inspected and admitted, even though one who enters under a knowing false claim of U.S. citizenship is not.

The BIA recently restated "the long-standing rule that an alien who enters the United States by falsely claiming United States citizenship effectively eludes the procedural regularity of inspection by an immigration officer." *Matter of Pinzon,* 26 I&N Dec. 189, 191 (BIA 2013). But since *Matter of Pinzon* cited *Matter of F–* with approval, see *Matter of Pinzon,* 26 I&N Dec. at 191, the best reading of *Matter of Pinzon* appears to be that "falsely claiming United States citizenship" within the meaning of that case implies doing so intentionally, knowing the claim to be false. This would be consistent with the conclusion of the State Department and the DHS General Counsel that inadmissibility under INA §212(a)(6)(C)(ii)(I), which refers to "Any alien who falsely represents, or has falsely represented himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . or any other Federal or State law," applies only to "a knowingly false claim", as explained at Note 11(b.)(1) of Volume 9, section 40.63 of the State Department's Foreign Affairs Manual. In normal English usage, we would not describe someone who says something which they fully believed to be true as having "falsely" claimed it—rather, we might say that they had done so "incorrectly", or "erroneously". An innocent but erroneous claim to U.S. citizenship is neither a ground of inadmissibility, nor a basis for invoking the exception to inspection and admission recognized by *Matter of Pinzon*. Thus, it can still qualify as an inspection and admission under *Matter of F-*.

Still, to say to someone in Hizam's position that he has been inspected and admitted, but has no right to remain in the United States unless he may seek adjustment of status as the immediate relative of a U.S. citizen, is extremely harsh. Being well over the age of 21, and married, he is no longer the immediate relative of his U.S. citizen father. *See* INA §201(b)(2)(A)(i); INA §101(b)(1). And because Hizam's father believed him to be a U.S. citizen, he had no reason to file a petition for his son before his son turned 21 and got married. *See* INA §201(f)(1) (providing that age for purposes of qualifying as an immediate relative is determined on the date of filing of the petition). As noted

above, had the State Department corrected its error any time within more than 10 years after the error was made, Hizam could easily have become a Lawful Permanent Resident; now he cannot. And had the State Department corrected its error less than 8 or so years after it was made, Hizam could easily have become a U.S. citizen under INA §322; now he cannot do that either. Hizam's father could theoretically file a petition for him under the Family Third Preference for married sons and daughters of U.S. citizens, as established by INA §203(a)(3), but the latest Department of State Visa Bulletin indicates a wait time of well over ten years before an immigrant visa number is available based on such a petition. (To be precise, the Visa Bulletin indicates that those who had petitions filed on their behalf before July 15, 2003, should be able to seek immigrant visas based on those petitions in April of 2014.)

If the decision in *Hizam v. Kerry* is not overturned (either by the Second Circuit sitting in banc or by the Supreme Court), Congress should give serious consideration to addressing this problem by legislation. With respect to Hizam himself, the problem can perhaps as the State Department suggested be solved by a private bill, granting him citizenship or at least lawful permanent residence. But the problem is a broader one. Those who, through no fault of their own or of their parents, are incorrectly told by the U.S. government that they are U.S. citizens, and who in reliance on that advice live in the United States and/or forego other opportunities which would exist to gain citizenship or lawful permanent residence, should also be eligible for U.S. citizenship, or at least for lawful permanent residence.

If Congress will not allow favorable determinations of U.S. citizenship to stand when they are made due to government error, it could at least amend INA §322 to give those who miss their opportunity to naturalize as children due to such error another chance. Currently, that statute provides in relevant part that a parent who is a citizen of the United States and meets the relevant residence requirements may apply for the naturalization of a child who is "under the age of eighteen years," INA §322(a)(3), and "is residing outside of the United States in the legal and physical custody of the applicant," INA §322(a)(4). This author would suggest the addition of a new subsection of §322, providing that a person who is over the age of eighteen years (and who therefore may not be in anyone's custody) may be naturalized under INA §322, upon appropriate application by that person, if at some time prior to the person reaching the age of eighteen years his or her parent was advised by the U.S. government,

without any misrepresentation on the parent's part, that their child was already a U.S. citizen, and this erroneous advice was not corrected until after the child reached the age of seventeen years. (Some margin for error before the age of eighteen would have to be allowed, since being advised a day before your child's eighteenth birthday that he or she was not actually a U.S. citizen, as you had previously supposed, would not provide sufficient time to get the child sworn in before age eighteen.)

Alternatively, if Congress is reluctant to allow expedited naturalization of someone in Hizam's position who is over the age of 18, it should amend the registry statute, INA §249, which currently allows the creation of a record of lawful admission for permanent residence of persons of good moral character who have resided in the United States since prior to January 1, 1972. That statute could be altered to include persons of good moral character who have entered the United States after January 1, 1972, on a U.S. passport which was issued to them without any misrepresentation by them or anyone acting on their behalf, but who are later determined not to be U.S. citizens.

If even this remedy is considered too extreme, then at the very least, INA §201(f)(1) should be amended to state that a child's age, for purposes of qualifying as an immediate relative, is determined either (A) on the date of filing of a petition by that child's parent, or (B) on the date the child or the child's parent is informed by the U.S. government, due not to any misrepresentation by either of them but to government error, that the child is a U.S. citizen (and that there is therefore no point in filing a petition). This would not help Mr. Hizam himself, due to his marriage, but it could help others in similar positions.

What should not happen, in any case, is for the law to remain the way it evidently is today, according to the Second Circuit's decision. It is unfair and outrageous to place someone in a position where, through no fault of their own or their parents, they can spend decades in the United States under the impression that they are a U.S. citizen, and then be told that they actually lack not only U.S. citizenship but any straightforward way of even gaining the legal right to reside in this country.