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

KERRY V. DIN: AN OPPORTUNITY FOR THE SUPREME COURT TO RECONSIDER THE DOCTRINE OF CONSULAR NON-REVIEWABILITY

Posted on October 6, 2014 by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew. We must disenthrall ourselves, and then we shall save our country.

President Abraham Lincoln, Second Annual Message (December 1, 1862)

Not since the landmark case of *Kleindienst v. Mandel*, 408 U.S. 753 (1972) has the Supreme Court revisited the well-settled doctrine of consular nonreviewability. That may be about to change as the Supreme Court has agreed to hear *Kerry v. Din*, Docket No. 13-1402. The vehicle for this doctrinal review is not the complaint of the unadmitted alien but that of the American citizens the abridgement of whose constitutional rights provides the standing to find out what happened and why. Indeed, it is precisely when denial of a visa impinges upon the free and full exercise of such constitutional freedoms that the courts have recognized a meaningful but limited exception to consular non reviewability. *Bustamanate v. Mukasey,* 531 F. 3d 1059 (9th Cir. 2013).

It so often happens that a spouse or parent of a US citizen is denied an immigrant visa at a US consulate on opaque grounds. Although the I-130 petition was carefully reviewed and approved, the consular officer can use any number of grounds under INA section 212 to deny an application for an immigrant visa, thus causing the permanent separation of the relative with the US citizen. Worse still, the consul need not cite the factual basis for the denial

and can only refer to the statutory provision. Take for example the "Security and related grounds" of inadmissibility under INA section 212(a)(3), which provide:

(A) In general – Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in –

(i) Any activity

(I) To violate any law of the United States relating to espionage or sabotage or

(II) To violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity; or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the government of the United States by force, violence, or other unlawful means is inadmissible

A consul can merely cite "section 212(a)(3)" when denying an applicant seeking an immigrant visa based on an I-130 petition filed by a US citizen relative. It is impossible to know whether this individual was denied the immigrant visa because the consul had reasonable grounds to believe that he or she was seeking to enter the United States to violate a law relating to espionage or prohibiting the export of some sensitive technology or some other unlawful activity. This individual in any event would find it difficult to contest the denial under the plenary power doctrine, which upholds the power of Congress to establish rules for the admission or exclusion of aliens. Given the absence of a factual basis, it would be even more difficult for this individual to challenge the denial even informally with a consular officer if no factual basis has been provided under section 212(a)(3). The absence of such disclosure seems in direct contradiction of the State Department regulation requiring consular officials in the event of an immigrant visa denial to "inform the applicant of the provision of law or implementing regulation under which administrative relief is available." 22 C.F.R. section 42.81(b). It is worth noting that this minimum level of disclosure does not prevent a more complete explanation to the visa applicant or the US citizen petitioner.

As noted above, despite the existence of the doctrine of consular non-

reviewability, a visa applicant may still seek review under limited circumstances when the denial implicates the constitutional rights of citizens. Under such circumstances, a consular officer must give a facially legitimate and bona fide reason for the denial. *See Kleindienst v. Mandel, supra*. The level of review in *Kliendienst v. Mande*l was highly constrained, and the Court refused to look behind the consular officer's denial on the ground that Mandel espoused the doctrines of world communism. That in itself was sufficient under the facially legitimate and bona fide test. The US interest in *Kliendienst v. Mandel* that triggered this limited judicial review were the First Amendment rights of US citizen professors who had invited Mandel to the United States to receive information and ideas from him. The facts as recited by the consular officer need not necessarily be true, but, for consular non-reviewability to shield it from further challenge, they must be stated with sufficient specificity and the consul must have a good faith belief in their veracity.

Despite the highly constrained review of the facially legitimate and bona fide test, an Islamic scholar was able to demonstrate that the consul was unable to meet this test in denying him a nonimmigrant visa under the terrorism ground of inadmissibility pursuant to INA 212(a)(3)(B)(i)(1). See *American Academy of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009). There the Second Circuit acknowledged that there was little guidance regarding the application of the facially legitimate and bona fide standard, and described it as "the identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason." *Id*. at 126.

The limited exception to the consular non-reviewability doctrine has also been extended to citizen's who have a protected liberty interest in marriage that entitles them to seek review of the denial of a spouse's visa. See *Bustamante v. Mukasey, supra.* Though not mentioned by the Ninth Circuit, it is perhaps not too large of a doctrinal enlargement to argue that the protection of such a liberty interest flows naturally from the recognition by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), that the freedom to marry is a fundamental constitutional right. Surely, the opportunity to live together in marital union in the United States with their spouse is an integral exercise of such freedom by the US citizen visa petitioner. The same high value attached to immediate relative relationships should apply to visa applications by parents of US citizens.

While the need to preserve the integrity of the marital union would not manifest itself under such slightly variant facts, the importance of facilitating the migration of older parents to live with their adult US citizen children should be given the same substantial deference. Nor should the wisdom of modifying the consular non-reviewability doctrine not enrich consideration of visa applications advanced by children, whether as immediate relatives, family first preference unmarried adult children or family third preference married adult sons or daughters of US citizens. A disciplined invocation of narrowly drawn statutory provisions and logical, if concise, factual summations brought in good faith are in the manifest interests of the consular corps and those it serves.

Indeed, when a consular denial recites a broad ground of inadmissibility that contains numerous categories of proscribed conduct such as in INA §212(a)(3)(B), the denial does not meet the facially legitimate and bona fide standard as all that the denial does is to cite a 1,000 word statute without providing a factual basis. *See* *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). In *Din v. Kerry,* the applicant whose visa was denied, Mr. Berashk was an Afghan citizen who married Ms. Din, a US citizen. Mr. Berashk had previously worked for the Afghan Ministry of Social Welfare from 1992 to 2003, and the Afghan Ministry of Education from 2003 to present. Since the Taliban ruled Afghanistan for some of the period during his employment with the Afghan government, his visa was initially denied because of INA section 212(a), without citing anything more specific. After contacting the Consulate for clarification, Mr. Berashk was told that his visa was denied under the terrorism related inadmissibility grounds in INA section 212(a)(3)(B). This provision exceeds 1000 words. No factual basis was provided to support the denial. Therefore, the Ninth Circuit held that the government had not offered a facially legitimate and bona fide reason for the visa denial. The government must cite to a ground narrow enough to allow us to determine that it has been "properly construed" under the test set forth in American Academy, *supra*.

The government appealed the Ninth Circuit's decision to the Supreme Court. The Supreme Court granted certiorari on October 2, 2014. *See Kerry v. Din*, Docket No. 13-1402. We fail to understand why the government chose to appeal this decision, which essentially upheld the highly constrained review of the facially legitimate and bona fide test set forth in *Kleindienst v. Mandel*. The Ninth Circuit insisted on the consul providing some factual basis for the denial rather than merely citing a broad statutory provision, but it did not articulate a

test beyond what was established in *Kleindienst v. Mandel*, and further explained in *Academy of Religion*. As the provisions of inadmissibility get more verbose in INA 212, the applicant who is being denied a visa ought to know the factual basis so that he or she can endeavor to overcome it by trying to submit rebuttal evidence. The dissenting opinion in *Din v. Kerry* broadly upheld plenary power, and the nation's desire to keep out persons who are connected with terrorist activities. It held that the citation of the statute, however broad, constituted a facially legitimate and bona fide ground. In a post 9/11 world, while there are obvious security concerns, the government cannot be allowed to loosely cite terrorism related grounds, without further explanation, that would lead to the permanent separation of a spouse from a US citizen.

It would be a set back if the Supreme Court reversed the limited review afforded to an applicant for a visa, especially when there is a legitimate US interest involved, by allowing the consul to broadly cite the statutory provision, or worse still, only INA section 212(a) as a basis for denial. While it is disappointing that the Obama administration chose to appeal the Ninth Circuit's decision in *Din v. Kerry*, it is hoped that the Supreme Court affirm the limited ability for an individual to seek review of a visa denial that would affect a US interest, such as a spouse, a group of US citizen academics who would otherwise be denied the ability to hear and debate his or her views, or even a US employer who has sponsored a foreign worker for a work visa or for permanent residency. The liberty interest of a US citizen spouse who awaits marital reunion with keen anticipation should be deserving of the same minimal due process that an academic conference would trigger. The issue is not the need to give due deference to consular visa denials but to put the consul to a minimal burden of proof where the reason for the denial is identified and the facts sustaining it are articulated with sufficient particularity to allow for intelligent review and reasonable challenge. Just as the Obama Administration wisely declined to defend DOMA even before the Supreme Court cast it aside, in wise recognition of its obvious constitutional infirmity, so a willingness to relax the doctrine of consular non-reviewability should inform the Administration's posture in this litigation and future cases like it. This may no longer be possible now that the Supreme Court has agreed to hear this case. Doubtless, however, this will not be the last time that the need for relaxation of the consular non-reviewability doctrine will present itself. When this happens, we urge that the Administration then in power adopt a more

enlightened attitude. A compassionate nation deserves no less.
(*Guest writer Gary Endelman is the Senior Counsel at FosterQuan*)