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SUPREME COURT MAY HAVE BOLSTERED RIGHTS OF FOREIGN NATIONALS WITH TIES TO THE UNITED STATES

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While disappointing that the Supreme Court allowed the ban to apply on visa applicants with no ties with the US from the banned countries, it may have permanently bolstered the rights of visa applicants who have ties to the US to challenge visa denials, which hitherto was not possible. This is the silver lining from yesterday's court order.

In *Trump v. IRAP*, the Supreme Court decided to review the preliminary injunctions of President Trump's travel ban in its next term. As an interim measure, however, the Court granted the government's application to stay the injunctions of the Fourth and Ninth Circuits, but created a broad exception. The travel ban "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." Through this statement, the Court overnight fashioned a new standard for determining against whom the ban would apply or not apply. The following extract from the Court's order is worth noting:

> The facts of these cases illustrate the sort of relationship that qualifies. For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience.

> Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

What constitutes a "bona fide relationship with a person or entity in the United States" will spawn plenty of litigation over the summer. Justice Thomas's dissent also predicted this. The broad exception will fortunately still allow many impacted by the ban to still travel to the United States, and so the order is by no means a win for President Trump as he falsely boasts. Still, potential entrants who do not readily have ties with the United States will get impacted, and the image of the United States will take a further bashing as it would attract fewer visitors. For instance, would a tourist who has already made a booking with a hotel in the US with a non-refundable deposit be able to claim to have a bona fide relationship with an entity in the United States? What about an E-2 investor who is the 100% owner of his LLC in the United States, which served the legal basis of her investment to obtain the E-2 visa? An argument can be made that the E-2 visa holder has a bona fide relationship with the LLC, even if he wholly owns it, as a corporation enjoys its own existence separate and apart from its owner. One would hope that a battered spouse who has filed a self-petition from overseas under the Violence Against Women Act would not get affected even though she has severed ties with the US citizen abuser in the United States. Since one has to establish a bona fide relationship with a "person" rather than a US citizen, it can be argued that a nonimmigrant derivative spouse and child would be able to enter the United States to be with the principal nonimmigrant visa holder. Conversely, if the US citizen spouse lives overseas, the I-130 petition that she may have filed for her spouse should still be processed as the US citizen ultimately needs to have an intent to reside in the United States as a sponsor on Form I-864, Affidavit of Support.

Even beyond the travel ban, the Court's new standard has overnight bolstered the chances of visa applicants to seek judicial review who have been refused a visa or admission if they have ties with the United States. In *Kerry v. Din,* both the opinions of the plurality and the concurrence gave short shrift to the fact that the beneficiary of an I-130 petition filed by his US citizen spouse could not claim a due process liberty interest because of his significant familial ties with a US citizen spouse. Instead, the long-held standard in *Kleindienst v. Mandel* was invoked, which is that so long as the visa refusal was facially legitimate and

bona fide, the courts would not look behind the consular officer's decision. Of course, if the refusal, while legitimate, suffers from a constitutional infirmity amounting to bad faith, as the Fourth Circuit analyzed in Trump's travel ban, then the refusal may still not be bona fide. However, this is still a high burden to meet.

But when a plaintiff can show ties as the Court fashioned - through a bona fide relationship with a person or entity in the United States - it raises the specter of more meaningful liberty interests that deserve greater due process protections than the broad "facially legitimate and bona fide standard" in *Kleindienst v. Mandel*. The plaintiff with sufficient US ties can request for the factual basis behind a denial so that it can be addressed more effectively. Justice Breyer's dissent in *Kerry v. Din* may have more force after yesterday:

> Rather, here, the Government makes individualized visa determinations through the application of a legal rule to particular facts. Individualized adjudication normally calls for the ordinary application of Due Process Clause procedures. *Londoner v. City and County of Denver,* 210 U.S. 373, 385-386, 28 S.Ct. 708, 52 L.Ed. 1103 (1908). And those procedures normally include notice of an adverse action, an opportunity to present relevant proofs and arguments, before a neutral decisionmaker, and reasoned decision making. See *Hamdi v. Rumsfeld,* 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion); see also Friendly, Some Kind of a Hearing, 123 U. Pa. L. Rev. 1267, 1278-1281 (1975). These procedural protections help to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law. It is that rule of law, stretching back at least 800 years to Magna Carta, which in major part the Due Process Clause seeks to protect. *Hurtado v. California,* 110 U.S. 516, 527, 4 S.Ct. 292, 28 L.Ed. 232 (1884).

Moreover, when liberty interests are implicated, a plaintiff can claim that being denied access to counsel deprived her of her ability to properly challenge the denial. Presently, foreign nationals do not have access to counsel, leave alone the right to counsel, at consular interviews and ports of entry. AILA and AIC have filed a petition for rulemaking to allow access to counsel precisely based on one's ties with the United States.

While the outcome of the case in the Supreme Court is unclear, the interim

order has for the time being bolstered the rights of foreign nationals with ties to the United States even outside the context of Trump's travel ban. This is clearly a positive development in the long run.