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US IMMIGRATION & NATIONALITY LAW

WATSON V. UNITED STATES: THE SECOND CIRCUIT TELLS U.S. CITIZENS IMPROPERLY DETAINED BY ICE TO FILE THEIR CLAIMS FOR DAMAGES WHILE THEIR IMMIGRATION COURT CASE IS ONGOING

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In its July 31, 2017, opinion in *Watson v. United States*, a panel of the U.S. Court of Appeals for the Second Circuit, over the dissent of Chief Judge Robert A. Katzmann, declared untimely the claim of false imprisonment brought by a U.S. citizen, Davino Watson, who had been detained by immigration authorities for nearly three years. A district court had awarded Mr. Watson compensation for the initial portion of this detention, although not for the portion of his detention when he was being prosecuted negligently in proceedings before an immigration judge (on the theory that malicious prosecution under New York law requires actual malice rather than mere negligence). According to the Second Circuit panel majority, however, Mr. Watson's claim of false imprisonment needed to have been brought soon after the proceedings against him began, or at least within two years of the time he was first incorrectly found to be a removable noncitizen by an immigration judge. The implication is that many people with plausible claims of U.S. citizenship who are detained by immigration authorities should file an administrative claim regarding their detention, and likely sue in federal court regarding that detention, even before their immigration proceedings are over.

Davino Watson had been born in Jamaica to unmarried parents, and had come to the United States as a lawful permanent resident (LPR) in 1998, at the age of thirteen, to live with his father. Watson's father then became a U.S. citizen on September 17, 2002, when Watson was only seventeen years old. Watson also became a U.S. citizen at that time under section 320(a) of the Immigration and Nationality Act (INA), 8 U.S.C. §1431(a), which bestows U.S. citizenship on the

child of a U.S. citizen, under the age of eighteen, who is "residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence." INA §320(a)(3), 8 U.S.C. §1431(a)(3).

After Watson pleaded guilty in New York State court in 2007 to sale of cocaine, agents of Immigration and Customs Enforcement (ICE), as the Second Circuit recounted, "investigated his citizenship status to determine whether he was deportable." This investigation, however, was, as the panel majority acknowledged, "beset by errors." That is putting it mildly. Watson told ICE he was a U.S. citizen during his very first interview, and gave them the phone number of his father and stepmother, but the ICE agents never called that number, even though the same number had been listed in Watson's pre-sentence report. ICE did make some attempt to look up Watson's parents in a government database, but it appears to have been an extremely slipshod attempt. Instead of Watson's father, Hopeton Ulando Watson, who lived in New York and whom Watson had told them was married, ICE found records for an unmarried man named Hopeton Livingston Watson, who lived in Connecticut, "did not have a child named Davino, and became a lawful permanent resident three years *after* the date of Davino Watson's lawful permanent residency." (ICE also confused Watson's mother, Clare Watson, with a "Calrie Dale Watson" in their database, although Calrie Dale Watson was married not to anyone with a name remotely resembling Hopeton Watson but rather to a man named Gabriel Miller.) This despite the fact that Davino Watson's own file contained an affidavit from his father, submitted in connection with Davino's application for lawful permanent residence, which "contained Hopeton Ulando Watson's date of birth, alien number, and social security number, none of which matched the corresponding file data for Hopeton Livingston Watson." Relying on the (irrelevant) fact that Hopeton Livingston Watson was not a U.S. citizen, a supervisory ICE officer drafted a Notice to Appear, and another supervisor, the district court found, "mindlessly signed" it and forwarded it to ICE officers who took Watson into custody.

Watson was detained by ICE for nineteen days before his Notice to Appear was filed with the Immigration Court, and "he first appeared before an immigration judge about a month afterward." In total, that is, Watson was detained for forty-eight days before he even saw an immigration judge. He again asserted his U.S. citizenship, and filed an application for a certificate of citizenship with U.S. Citizenship and Immigration Services (USCIS).

Watson's application for a certificate of citizenship was denied on the basis of the then-recent decision of the Board of Immigration Appeals (BIA) in *Matter of Hines*, 24 I&N Dec. 544 (BIA 2008), which had held that a child born in Jamaica could only have his paternity established "by legitimation" if the child's parents married. Because being "legitimated" is a prerequisite for someone born out of wedlock to qualify, with respect to their father, as a "child" for purposes of INA §320(a) under the definition of "child" in INA §101(c)(1), 8 U.S.C. §1101(c)(1), USCIS determined based on *Hines* that Davino Watson did not qualify as his father's "child" and so could not have acquired citizenship under INA §320. The Immigration Judge agreed, and ordered Watson's removal on November 13, 2008.

The application of *Matter of Hines* to deny Watson's claim to U.S. citizenship was problematic for a number of reasons, and the BIA ultimately concluded that Watson was indeed a U.S. citizen, although as the Second Circuit panel majority noted, "he government's precise views on the application of Hines to Watson's case are somewhat obscure." *Matter of Hines* may, as ICE suggested in a memorandum and Chief Judge Katzmann emphasized in his dissent, never have been meant to apply retroactively to those like Watson who would have been citizens under the previous precedent of *Matter of Clahar*, 18 I&N Dec. 1 (BIA 1981). The general rule is that citizenship is acquired based on the law in effect when the last of the conditions for it is met—which, in Watson's case, would have been in 2002 when his father naturalized, after *Clahar* was decided and long before *Hines* was decided. In addition, the *Hines* definition of "paternity by legitimation" for purposes of a different INA provision may not, as the BIA indicated in an unpublished opinion in Watson's case, have applied to the word "legitimated" in INA §101(c)(1). After Watson's case had been resolved, the BIA partly overruled *Matter of Hines* in a published opinion, *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015), which reinstated and reaffirmed *Matter of Clahar* and confirmed that *Hines* should not be applied to prevent a child born to unmarried parents in Jamaica from qualifying as a "child" under INA §101(c)(1) and §320(a). Rather, all children born or residing in Jamaica after the 1976 effective date of the Jamaican Status of Children Act, which gave equal rights to children born out of wedlock, are considered legitimated for purposes of INA §101(c)(1) and §320(a).

The Second Circuit remanded Watson's removal case to the BIA for clarification regarding the legitimation issue on May 31, 2011, in *Watson v. Holder*, 643 F.3d

367 (2d Cir. 2011). Watson was released from ICE custody in November 2011, evidently on the basis of his claim to U.S. citizenship, although he was released "into rural Alabama (where he knew nobody), without money, and without being told the reason for his release." His removal proceedings formally continued for more than a year after that, until the BIA ruled that he was a citizen and terminated his removal proceedings. He then finally received a certificate of citizenship on November 26, 2013.

Having been recognized as a U.S. citizen, Mr. Watson sought compensation for his legally unjustified detention by filing an administrative claim for damages with the Department of Homeland Security (DHS) on October 30, 2013, under the Federal Tort Claims Act (FTCA). After that claim was denied, he brought a lawsuit in the U.S. District Court for the Eastern District of New York on October 31, 2014. While the district court rejected his malicious-prosecution claim because, as noted above, such claims under New York law (incorporated by reference through the FTCA) require actual malice and not mere negligence of the sort exhibited in Mr. Watson's case by ICE, the district court found that Mr. Watson had a meritorious claim for false imprisonment regarding the initial period of his detention. That claim was subject to a two-year statute of limitations, but the district court found that this statute of limitations had not begun to run until Watson received his certificate of citizenship in November 2013, or in the alternative that Watson's claim was saved by equitable tolling of the statute of limitations. The Second Circuit panel majority, however, over the vehement dissent of Chief Judge Katzmann, disagreed on both points.

The two-year clock for Watson to file his claim, the Second Circuit held, began at the latest in November 2008, when the Immigration Judge ordered Watson's removal. At that point, if not earlier, the false imprisonment ended, the Second Circuit held, because Watson was held "pursuant to legal process." This was more than two years before Watson filed his claim in 2011.

The Second Circuit panel majority also overruled the district judge's finding that Watson was entitled to equitable tolling of the limitations period. According to the majority, Watson had not shown that "some extraordinary circumstance stood in his way" and prevented him from timely making his claim. The district court had granted equitable tolling, as the majority explained, "based on Watson's lack of education and legal training, his unawareness that he could bring an FTCA claim until being advised by appointed counsel, his depression, and 'most significantly,' the fact that government officials told Watson that he

was not a U.S. citizen." The Second Circuit panel majority found that "one of these reasons justifies equitable tolling." Given Watson's ability to fight his case in immigration court, the panel majority held, he could not show that his depression or his having been repeatedly told he was not a U.S. citizen prevented him from bringing an FTCA claim. And because Watson's lack of education and legal training were "an entirely common state of affairs," they were not sufficiently extraordinary to justify equitable tolling, even though Watson had not had legal counsel during most of his time in detention.

Chief Judge Katzmann, in his dissent, disagreed with both the panel majority's ruling regarding the initiation of "legal process" in immigration court as beginning the running of the statute of limitations on Watson's false-imprisonment claim, and the majority's decision to overturn the grant of equitable tolling. On the "legal process" point, Chief Judge Katzmann objected to the significance that the panel majority attached to a hearing process in which the detained person was not entitled to, and did not have, the assistance of counsel. In the criminal context, the procedural landmarks upon which "legal process" has been held to commence and cut off a false-imprisonment claim are also times at which a criminal defendant is entitled to the assistance of counsel. Here, on the other hand, the government was arguing that Watson's false-imprisonment claim should end because of a legal proceeding at which he, alone and without an attorney, bore the burden of making a complex argument regarding the significance of legitimation. Chief Judge Katzmann observed that "if there is any case where *meaningful* legal process cannot be said to have begun without the assistance of counsel, this, surely, is one." As for equitable tolling, Chief Judge Katzmann found that the district judge had not abused his discretion in holding it to be warranted. As he concluded:

> I would hope that nothing about Watson's 1,273-day detention can be said to have been "an entirely common state of affairs." Maj. Op. at 14–15. If it were, we should all be deeply troubled. An American citizen was detained on the basis of a "grossly negligent" investigation that "led to wrongful detention." The government, the IJ, and the BIA all misapplied clear precedents of law, which, coupled with Watson's lack of counsel until mid-2011, resulted in his three-and-a-half-year detention. Watson had an eleventh-grade education, suffered from depression as a result of his detention, and was repeatedly told by ICE officials, government lawyers, the IJ, and the BIA that he was not a U.S. citizen and that he would be removed

> from the country he had known as his home from the time he was 14 years old. Given all this, I cannot conclude that the "legal process" Watson experienced should extirpate his legal claims, nor can I draw the conclusion that the district court abused its discretion in determining that Watson's case merited equitable tolling.

Watson, slip op. at 18 (Katzmann, C.J., dissenting) (internal citations omitted).

As a practical matter, it seems to this author unfair to fault Mr. Watson for not filing an administrative claim sooner. Chief Judge Katzmann appears to me to have the better of the argument with the panel majority regarding the impropriety of overturning the district judge's fact-specific finding of equitable tolling under these circumstances. Beyond that, however, the Second Circuit's decision has created a legal situation that DHS may come to regret.

According to the Second Circuit's decision in *Watson*, it appears that any immigration detainee who believes that he or she is a U.S. citizen and has been improperly detained should commence the process of filing an FTCA claim, and if necessary suing the government in federal court, before the removal proceedings against him or her are resolved. At least in the Second Circuit, the government cannot object in response to such a filing that the claim cannot be brought until the removal proceedings are terminated. The Second Circuit majority in *Watson* has rejected that analysis, which the district court had followed based on an analogy to *Heck v. Humphrey*, 512 U.S. 477 (1994) (requiring that a criminal conviction be set aside or declared invalid in some way before one can seek damages relating to an unconstitutional conviction or sentence). Rather, according to *Watson*, the government must defend the FTCA claim, and the related lawsuit, in parallel with the removal proceedings.

Moreover, a federal court judgment in the FTCA action declaring that the detainee was a citizen and thus unlawfully detained should, it seems, have preclusive effect on the removal proceedings. Thus, a claimed U.S. citizen would not have to wait for the judicial review of this citizenship claim that would be available under 8 U.S.C. §1252(b)(5) after the Immigration Court and BIA had addressed his case. Rather, by pursuing the FTCA action, it would be possible to obtain judicial review of the U.S. citizenship claim before the removal proceedings had otherwise run their course.

This earlier judicial attention to a U.S. citizenship claim might also have the salutary effect of provoking a quicker release of the detainee from custody.

Faced with possible liability on the part of the United States, one would hope that an Assistant U.S. Attorney or an attorney from the Department of Justice's Office of Immigration Litigation might intervene with DHS to get a detainee released more quickly.

Ultimately, the troubling decision in *Watson* may still result in more lost redress for unjustly imprisoned U.S. citizens, who lacked legal counsel, than it does additional opportunities for counseled detainees. However, there is a possible silver lining to the cloud, and it is one the government may find itself displeased to have created.