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

THOSE WHO CANNOT REMEMBER THE PAST: HOW MATTER OF CASTRO-TUM IGNORES THE LESSONS OF MATTER OF AVETISYAN

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Attorney General Jefferson B. Sessions III recently ruled in *Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018)*, that immigration judges cannot under most circumstances "administratively close" cases before them (other than in a few instances where this is specifically authorized by regulation or court-approved settlement), even though the practice has been followed for many years. Administrative closure had previously allowed immigration judges to avoid spending time on cases that were awaiting action by another agency or were otherwise lower-priority, but Attorney General Sessions has generally removed this option. Instead, he has insisted that Immigration Judges must either resolve cases before them promptly, or grant a continuance "for a fixed period" where justified. *Matter of Castro-Tum*, 27 I&N Dec. at 289.

The Attorney General's decision in *Castro-Tum* has been the subject of a great deal of justified criticism from various sources, including AILA Secretary Jeremy McKinney, the American Immigration Council, the National Immigrant Justice Center, retired Immigration Judge Paul Wickham Schmidt, and Judge Ashley Tabbador, the president of the National Association of Immigration Judges. All of that criticism is worthy of review. In this blog, however, I want to focus on something which struck me about *Castro-Tum* that has not been addressed as much in the public criticism to date: the degree to which it ignored the rationale of the leading case it overturned. By ignoring the reasons that justified the expansion of administrative closure in the first place, Attorney General Sessions has set the table for a potentially substantial increase in the immigration courts' backlog of cases that may defeat whatever goal he believed the abolition of administrative closure would accomplish.

As Attorney General Sessions recognized in *Castro-Tum*, the use of administrative closure expanded when, in its 2012 decision in *Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012)*, the Board of Immigration Appeals held that cases could be administratively closed over the objection of one of the parties. Notably absent from the Attorney General's decision in *Castro-Tum*, however, is any discussion of the facts in *Avetisyan* that had led the BIA to come to this conclusion.

The respondent in *Matter of Avetisyan* had a U.S. citizen husband, who had naturalized during the first half of 2007 (after a January 29 hearing and prior to a June 14 one), and had previously filed an I-130 petition with USCIS to sponsor her for lawful permanent residence as his spouse. This would have been the basis for the respondent to seek adjustment of status before the Immigration Judge, had the petition been approved. As of September 2007, the respondent and her husband had been interviewed and had evidently provided all documents requested of them, but were waiting for USCIS to make a final decision on the petition.

Despite "five additional continuances" granted by the Immigration Judge, however, the I-130 petition at issue in *Avetisyan* was not adjudicated by USCIS. "During the December 11, 2007, hearing, counsel for the DHS indicated that she did not have the file and that it was possibly with the visa petition unit. On April 15, 2008, counsel for the DHS explained that the file was being transferred back and forth for each hearing before the Immigration Judge." *Matter of Avetisyan*, 25 I&N Dec. at 689-690. That is, it appeared to be the repeated immigration court hearings themselves that were preventing the I-130 petition from being adjudicated: in preparation for each hearing, the file was being shifted from the USCIS unit which would have adjudicated the petition, to the attorneys representing DHS in the immigration court. The Immigration Judge in *Avetisyan*, affirmed by the BIA, sought to avoid this conundrum by administratively closing the case, so that the I-130 petition could be adjudicated without the file being diverted to a DHS attorney in preparation for yet another hearing. The case could then have been restored to the Immigration Court's calendar once the I-130 petition had been adjudicated.

The Attorney General's decision in *Matter of Castro-Tum* does not address this fact pattern at all, and does not suggest what an Immigration Judge or the Board ought to do under circumstances similar to those at issue in *Matter of Avetisyan*. Continuances for a fixed period of time would not solve the problem

if each continued hearing caused the file to be pulled away from USCIS petition adjudicators, just as appears to have occurred five times in *Avetisyan* before the Immigration Judge called a halt to the absurdity. The cycle of continuances and file movement could literally go on indefinitely.

The alternative which this author suspects Attorney General Sessions might prefer, ordering the respondent removed because USCIS had not yet finished adjudicating a petition on his or her behalf, would be even more absurd, and unlikely to survive review in an appropriate Court of Appeals. USCIS, after all, is a branch of DHS, the very agency which takes the prosecutor's role before the Immigration Court to argue that someone should be removed. In opposing a continuance under the sort of circumstances at issue in *Avetisyan*, DHS would be in the position of asking that someone be removed from the United States because they, DHS, had not yet deigned to adjudicate a petition filed on that person's behalf. Even in *Avetisyan* itself, DHS did not dare go that far (instead requesting a further continuance). The possibility brings to this author's mind Leo Rosten's classic definition of chutzpah, relayed in the ABA Journal as "a person charged with killing his parents who pleads for mercy because he's now an orphan."

In a different context relating to motions to reopen, the Court of Appeals for the Second Circuit, in *Melnitsenko v. Mukasey*, rejected "the imposition of a mechanism by which the DHS, an adversarial party in the proceeding, may unilaterally block for any or no reason, with no effective review by the BIA." The same objection would apply if DHS, a party to the removal proceedings, could seek to block relief and effect removal simply by delaying adjudication of an I-130 petition indefinitely. But in the *Avetisyan* scenario, absent administrative closure, it may be that the only other option besides allowing this sort of deeply problematic unilateral blockade by DHS would be an indefinite cycle of continuances.

Philosopher George Santayana wrote in *The Life of Reason* that "Those who cannot remember the past are condemned to repeat it." Notwithstanding his expressed desire in *Matter of Castro-Tum* for more expeditious adjudication of immigration court cases, Attorney General Sessions may have put himself in the position described by Santayana. He has abolished the tool used in *Matter of Avetisyan* to avoid an indefinite delay, without addressing, or seemingly remembering, the scenario which had caused that tool to be necessary in *Avetisyan*. He may thereby have condemned himself, and the immigration

court system, to repeat the sort of indefinite delays that gave rise to *Avetisyan* in the first place.