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IN HONOR OF JUSTICE GINSBURG: DISFAVORING PIEPOWDER COURTS AGAINST PERMANENT RESIDENTS IN VARTELAS V. HOLDER

Posted on September 19, 2020 by Cyrus Mehta

Saddened by the death of Justice Ginsburg, I searched through the blogs I have written on her opinions in immigration cases. I was again reminded not only about her brilliance but how forcefully she advanced the rights of immigrants that was consistent with the Constitution and the Immigration and Nationality Act. I wrote Justice Ginsburg's Observation on Piepowder Courts in Vartelas v. Holder in 2012 with Gary Endelman when he was in private practice and is now an Immigration Judge. Upon re-reading the blog after the announcement of her death last evening, it deeply resonated in me as this blog was inspired by the same passion as Justice Ginsburg's forceful opinion in *Vartelas v. Holder* upholding the rights of permanent residents (LPR) as they existed before the 1996 Act. An LPR who was convicted of a crime prior to 1996 should not be found inadmissible if the trip outside the US was brief, casual and innocent. Piepowder, or dusty feet courts, as Justice Ginsburg quaintly observed in a footnote, were temporary mercantile courts quickly set up to hear commercial disputes at trade fairs in Medieval Europe while the merchants' feet were still dusty. Since the law post- 1996 could not be applied retroactively, a CBP officer may not set up a "dusty feet" court at the airport to determine whether a returning LPR committed crimes in the past and then find him or her inadmissible. *Vartelas v. Holder* partially restored the rights of LPRs only for crimes convicted prior to the 1996 law. In 2017, the Second Circuit in *Centurion v. Sessions* expanded the retroactive application of the pre-1996 entry doctrine to the commission of crimes even if the conviction of that crime occurred after after 1996. The project remains unfinished. The pre-1996 entry doctrine must be restored completely so that LPRs , who have due process rights long recognized by the Supreme Court, are not placed in

jeopardy at the airport for inadmissible crimes committed even after 1996 if their trip abroad was brief, casual and innocent. A future Justice in the same mold as Justice Ginsburg will need to write the next decision.

JUSTICE GINSBURG'S OBSERVATION ON PIEPOWDER COURTS IN VARTELAS V. HOLDER

April 16, 2012/0 Comments/in Blog /by Cyrus Mehta

By Gary Endelman and Cyrus D. Mehta

In the recent landmark Supreme Court decision of *Vartelas v. Holder*, No. 10-1211, 565 U.S. ___, U.S. LEXIS 2540 (March 28, 2012), which partially restores the rights of lawful permanent residents (LPR) with pre-1996 convictions, Justice Ginsburg, who wrote the opinion for the majority, made an interesting reference to piepowder courts. For an explanation of the potential significance of *Vartelas v. Holder*, we refer readers to our previous blog entitled Fleuti Lives! Restoration of A Constitutional Decision.

Piepowder, or dusty feet courts, as Justice Ginsburg's decision explains in footnote 12, were temporary mercantile courts quickly set up to hear commercial disputes at trade fairs in Medieval Europe. These courts were set up to resolve disputes while the merchants' feet were still dusty.

Justice Ginsburg made this reference to piepowder courts in the immigration context in our modern era, stating that an immigration official at the border would not set up a piepowder court to determine whether an LPR committed an offense identified in INA § 212(a)(2) to determine whether he or she was inadmissible. This is what Justice Ginsburg said: "Ordinarily to determine whether there is clear and convincing evidence that an alien has committed a qualifying crime, the immigration officer at the border would check the alien's record of conviction. He would not call into session a piepowder court to entertain a plea or conduct a trial."

The Supreme Court's observation on quaint "dusty feet" courts, although charming, is also extremely significant. Most lawyers who do not practice immigration law, and of course everyone else, will be surprised to know that a non-citizen, including an LPR, can be found inadmissible under INA § 212(a)(2) for being convicted or who admits having committed certain crimes, such as crimes involving moral turpitude or controlled substance offenses. Thus, a

non-citizen, including an LPR, need not have a criminal conviction to be found inadmissible, he or she can be equally snared for having admitted to the commission of a crime. Clearly, with respect to an LPR travelling from abroad, Justice Ginsburg's observation appears to restrict a CBP officer's ability at an airport from trying to obtain a confession regarding the commission of a CIMT. A CBP official cannot set up a piepowder court at the airport, like the merchants of a bygone era, to try an LPR who has travelled through many time zones, and who instead of having dusty feet may have bleary eyes, for the purposes of bludgeoning him or her into an admission for having committed a crime.

Admittedly, the observation on piepowder courts was *obiter dictum*. It was made in the context of whether INA § 101(a)(13)(C), enacted by the Illegal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which allows the government to charge a long term LPR as an arriving alien for having committed an offense under 212(a)(2), could be applied retroactively. The Supreme Court in *Vartelas v. Holder* held that the doctrine enunciated in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), that an LPR who made a brief, casual and innocent trip abroad should not be charged as an arriving alien, still applies to LPRs with pre- IIRIRA criminal conduct. Noting that there was a presumption against retroactive legislation under *Landgraf v. USI film Products*, 511 U.S. 244 (1994), the Supreme Court in *Vartelas* concluded that INA § 101(a)(13)(C)(v) resulted in an impermissible retroactive effect as it created a "new disability" to conduct completed prior to IIRIRA's enactment in 1996. This new disability was Vartelas' inability to travel after 1996, which he could freely do so prior to 1996. The Court criticized the Second Circuit in the same case below, which did not find INA §101(a)(13)(C)(v) retroactive since it did not reference a conviction but only the commission of a crime, which if pleaded to prior to 1996 in reliance of more favorable treatment under pre-1996 law, would have been impermissibly retroactive as in *INS v. St. Cyr*, 533 U.S. 289 (2001). It was at this point that Justice Ginsburg said that "he practical difference (between a conviction and commission of a crime), so far as retroactivity is concerned, escapes our grasp" and then made her observation that an immigration official would in any event need to determine under the clear and convincing standard at the border by checking the record of conviction, rather than convene a piepowder court, to determine whether the alien committed the crime.

It is also significant that Justice Ginsburg in her observation on piepowder

courts affirmed that the burden has always been on the government to establish that an LPR is not entitled to that status, and this burden established in *Woodby v. INS*, 385 U.S. 276 (1966), is that the government must prove by "clear, unequivocal and convincing" evidence that the LPR should be deported. This burden applies to all LPRs regardless of whether they have pre-1996 or post-1996 criminal convictions. Thus, under a *Woodby* analysis too, since the government bears a heavy burden of proof, it would be turning the tables on the LPR if the government tried to extract a confession regarding the commission of a crime and thus be able to escape from the heavy burden it bears under the "clear, unequivocal and convincing" standard. This can potentially happen with an LPR who may have had the charges dismissed or reduced, but a nasty CBP official still wants to know the real story via a hypothetical piepowder court at the airport. Indeed, the Board of Immigration Appeals held many years ago in *Matter of Guevara*, 20 I&N Dec.238 (1990) that an alien's silence alone does not provide sufficient evidence under the *Woodby* standard, in the absence of other evidence, to establish deportability. The following extract from *Matter of Guevara* is worth noting:

The legal concept of a "burden of proof" requires that the party upon whom the burden rests carry such burden by presenting evidence. If the only evidence necessary to satisfy this burden were the silence of the other party, then for all practical purposes, the burden would actually fall upon the silent party from the outset. Under this standard, every deportation proceeding would begin with an adverse inference which the respondent be required to rebut. We cannot rewrite the Act to reflect such a shift in the burden of proof.

Of course, an LPR can still voluntarily admit to the commission of a crime if he or she chooses to, but such an admission needs to meet rigid criteria. The BIA has set forth the following requirements for a validly obtained admission: (1) the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; (2) the applicant must have been provided with the definition and essential elements of the crime in understandable terms prior to making the admission; and (3) the admission must have been made voluntarily. *See Matter of K-*, 7 I&N Dec. 594 (BIA 1957).

Justice Ginsburg's piepowder observation in *Vartelas v. Holder*, together with *Matter of K* and *Matter of Guevara*, provide more arsenal to an LPR who is charged as an arriving alien based on the commission rather than the conviction of a crime under INA § 212(a)(2). Beyond this, the disinclination to

sanction ad hoc investigation through a "dusty feet" court conducted without legal sanction or moral restraint reflects a commendable preference for the stability of the written record as the framework for informed decision.

The conceptual framework that governs any discussion of retroactivity is the traditional two-step formula announced in *Landgraf v. USI Film Products, supra.* Since Congress did not expressly instruct on how far back IIRIRA could go, we move to the second prong announced by the High Court at page 277 of *Landgraf*, namely whether giving retrospective effect to INA 101(a)(13)(C)(v) will contradict basic notions of proper notice and upset "settled expectations" on which the actor "reasonably relied." When in doubt, retroactivity is disfavored. The Supreme Court got it right. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf, 511 US at 265.*

Justice Ginsburg's admonition reflects a profound appreciation of the due process rights that returning LPR's have traditionally enjoyed.
While *Woodby* may not have been a constitutional decision, the warning against piepowder courts can only be understood in a constitutional context. Remember the returning LPR seaman in *Kwong Hai Chew v Colding,* 349 US 590(1953) that authorities sought to exclude without a hearing; the Supreme Court reminded us that he deserved full constitutional rights to a fair hearing with all the due process protection that would have been his had he never left. Remember what *Rosenberg v Fleuti, 374 US 449, 460(1963)* taught us: "A resident alien who leaves this country is to be regarded as retaining certain basic rights." Remember the ringing injunction of *Shaughnessy v. US ex rel Mezei, 345 US 206, 213(1953): "*A lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process." In essence, behind Justice Ginsburg's distaste for piepowder courts when applied to returning resident aliens, regardless of when their conviction or admission took place, is nothing less than the right " to stay in this land of freedom." *Landon v. Plasencia,* 459 US 21, 36 (1982) *quoting Bridges v. Wixon,* 306 US 135, 154 (1945).

The refusal to sanction IIRIRA retroactivity in *Vartelas v. Holder* provides the kind of predictability that LPRs need and deserve before they leave the USA and seek to return. This, after all, is why retroactivity is disfavored .This is precisely why a piepowder court is not allowed; an LPR should know what this status means, what his or her rights are and should be able to leave the US with the confidence that an uneventful return is not only possible but entirely to be

expected. In this sense, the refusal to embrace IIRIRA retroactivity and the caution against a piepowder court spring from the same place and say the same thing- predictability is at the very essence of a lawful society. After all, to borrow Einstein's happy phrase, God does not play dice with the universe.

(The views expressed by guest author, Gary Endelman, are his own and not of his firm, FosterQuan, LLP)