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THE LAW DOES NOT COMPEL THE IMPOSSIBLE– OR DOES IT?: MATTER OF C-C- AND AWUKU-ASARE V. GARLAND

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"*Lex non cogit ad impossibilia*." In English, as translated by the Court of Appeals for the Eleventh Circuit, that means: "The law does not compel the doing of impossibilities." In 1948, citing this principle, the Board of Immigration Appeals (BIA) held that a nonimmigrant seaman could not be deported for having failed to leave the United States timely when, at the time he was supposed to leave, he was in jail pending trial for a crime of which he was later acquitted. *Matter of C-C-*, 3 I&N Dec. 221, 222 (BIA 1948). But last week, the Court of Appeals for the Tenth Circuit affirmed the BIA's removal order against a student who had failed to attend classes while in jail pending trial for a crime of which he was later acquitted. *Awuku-Asare v. Garland*, ___ F.3d ___, No. 19-9516 (slip op. March 16, 2021).

The BIA's 1948 decision in *Matter of C-C-* is not publicly available online in its entirety (although it can be obtained from sources such as Westlaw and Lexis), as the Department of Justice's online collection of precedent decisions only goes back to Volume 8 covering 1958-1960. The decision was, however, summarized in the more recent and thus publicly available *Matter of Ruiz-Massieu*, 22 I&N Dec 833 (BIA 1999), as follows:

> Matter of C-C-, 3 I&N Dec. 221 (BIA 1948), involved an alien who was held in custody pending trial for a criminal charge past the time of his authorized stay. The Board held that he was not deportable as an overstay under the principle that the law does not compel the impossible. Id. at 222.

Matter of Ruiz-Massieu, 22 I&N Dec. at 841.

The original *Matter of C-C-* decision, which I will take the liberty of excerpting even without a hyperlink, provides additional details:

> The appellant, a native and citizen of China, male, 44 years of age, last entered the United States at the port of Boston, Mass., July 30, 1947, as a seaman. He was admitted for a period not to exceed 29 days. The record indicates that the appellant intended to reship foreign at the time of said entry.
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> The appellant testified that he was arrested by customs officials at Boston the day after his arrival and charged with smuggling opium. The record indicates that he was acquitted of this charge in the District Court of the United States at Boston, Mass., on October 17, 1947. The warrant for the appellant's arrest in deportation proceedings was issued October 1, 1947, while he was in custody awaiting trial on the narcotic charge and prior to his acquittal. He had been in custody since the day following his admission on July 30, 1947.
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> This case is to be distinguished from a case where the alien's criminal act caused his incarceration. Here, by judicial finding, the appellant was not guilty of a criminal act. An alien cannot be prevented from departing from the United States in accordance with the terms of his admission and then be found deportable for not so departing. "*Lex non cogit ad impossibilia*." The appellant should be given a reasonable period of time within which to depart. Failure to so depart would then render the appellant deportable.

Matter of C-C-, 3 I&N Dec. at 221-222.

Daniel Kofi Awuku-Asare recently found himself in somewhat similar circumstances to Mr. C-C-, except that he was a student charged with rape rather than a seaman charged with drug smuggling. As the Court of Appeals for the Tenth Circuit recounted in its March 16 opinion in *Awuku-Asare v. Garland*,

> Awuku-Asare entered the country on a nonimmigrant F-1 visa and could lawfully remain in the United States so long as he complied with the conditions of his visa. Relevant here, maintaining an F-1 visa status requires maintaining a full course of study at an approved educational institution. But Awuku-Asare did not comply with this full-course-of-study requirement because he was incarcerated for approximately 13 months for a crime of which he was ultimately acquitted.

Awuku-Asare, slip op. at 2.

According to the Tenth Circuit, an Immigration Judge ordered Awuku-Asare removed and "he BIA sustained the removability charge. . . determining that "s a result of his arrest and detention," Awuku-Asare could not "pursue the requisite 'full course of study.'" *Awuku-Asare*, slip op. at 3. (quoting 8 C.F.R. § 214.2(f)(5)(i)). Awuku-Asare was thus found removable under INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i), which provides that "Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed . . . or to comply with the conditions of any such status, is deportable."

The Tenth Circuit upheld the removal order against Mr. Awuku-Asare, rejecting his argument that deportability for failure to maintain status requires "that the nonimmigrant's failure to maintain status must have been caused by some affirmative act performed by the nonimmigrant or that the failure to maintain status was otherwise the nonimmigrant's fault." *Awuku-Asare*, slip op. at 7. Such an interpretation, the Tenth Circuit held, "necessarily adds text to an unambiguous statute. And that is something we cannot do." *Id*.

As in *Matter of C-C-*, however, the interpretation of the statute that led to the issuance of an order against Mr. Awuku-Asare would seem to have required him to do the impossible. He could no more attend classes in person at his college while incarcerated than C-C- could have left the United States while incarcerated. (Attendance at other educational programs for incarcerated inmates likely would not have sufficed, since maintenance of F-1 student status requires attendance at "an institution of higher learning which awards recognized associate, bachelor's, master's, doctorate, or professional degrees," 8 CFR 214.2(f)(6)(ii), as well as the completion of proper transfer procedures with the assistance of the new receiving school, 8 CFR 214.2(f)(8).) The BIA and then the Tenth Circuit, however, did not follow *Matter of C-C-* and give Mr. Awuku-Asare the benefit of the principle "*Lex non cogit ad impossibilia*."

It appears that *Matter of C-C-* may not have been cited by the BIA or by Mr. Awuku-Asare's counsel before the Tenth Circuit (he represented himself before the Immigration Court and BIA, *see Awuku-Asare*, slip op. at 3-4 fn.1.). At least, it is not cited in the Tenth Circuit's decision, even to explain why it would not apply. It is possible that neither counsel nor the Court found the decision because it pertains to a slightly different mechanism of removability than was

at issue in *Awuku-Asare*: Mr. C-C- had been charged with overstaying his admission, which would today be the subject of a charge under INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B), not INA § 237(a)(1)(C)(i). But *Matter of C-C-* remains good law today, and it would appear to have been relevant here. Particularly faced with an unrepresented respondent, the BIA ought to have taken it upon itself to cite *Matter of C-C-* and distinguish it if appropriate. It evidently did not do so because the issue was not raised below, however, and it is possible that Mr. Awuku-Asare's appointed counsel at the Court of Appeals for the Tenth Circuit did not raise the argument because it would not have been properly exhausted (as a general rule, courts do not consider arguments on review of removal proceedings that were not made during those removal proceedings). The Tenth Circuit was relatively forgiving about broadly construing the arguments that Mr. Awuku-Asare did make below without a lawyer, but declined to consider one argument that was made to it but had not been made below. *Awuku-Asare*, slip op. at 3-4 fn 1.

In the end, the problem here may be that attending college classes while imprisoned, pending trial for a crime of which he was acquitted, was not the only impossible thing that the law required Mr. Awuku-Asare to do. By statute, a respondent in removal proceedings only has a right to counsel "at no expense to the government", INA § 292, 8 U.S.C. § 1362, and not a right to publicly-funded appointed counsel, such as is provided to defendants in criminal proceedings under the Sixth and Fourteenth Amendments as interpreted in *Gideon v. Wainright*, 372 U.S. 335 (1963). If a respondent in removal proceedings cannot afford to pay a lawyer, and cannot find a lawyer to represent him or her pro bono (without fee), then he or she may have to proceed without a lawyer. Immigration law is sufficiently complex, however, that effectively representing oneself without a lawyer is often no more possible than attending classes at one's college while in prison. Certainly, it would have been extremely difficult for Mr. Awuku-Asare to become aware of *Matter of C-C-* on his own.

New York State and New York City have provided funding for representation of detained respondents through the New York Immigrant Family Unity Project, meaning that a detained respondent like Mr. Awuku-Asare would have received free representation if he had been in New York. Other jurisdictions have begun similar programs as well. There is also limited federal funding for representation of unaccompanied children and certain people deemed incompetent due to a mental disorder. Ultimately, as the American Immigration

Council has explained, Congress and the Biden Administration should amend the INA and its implementing regulations to provide a right to publicly-funded counsel for those unable to afford it, so that people like Mr. Awuku-Asare do not have their cases decided without regard to relevant law simply because they cannot afford a lawyer.