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MATTER OF CASTRO-TUM IS DEAD EVERYWHERE EXCEPT IN THE SIXTH CIRCUIT: IT MUST BE BURIED THERE TOO

Posted on August 10, 2021 by Cyrus Mehta

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In a previous blog, we argued that *Matter of Castro- Tum*, a Trump era decision by then Attorney General Jeff Sessions should be withdrawn. *Matter of Castro - Tum* held that Immigration Judges (IJs) and the Board of Immigration Appeals (BIA) do not have the authority to administratively close cases, unless expressly authorized by a previous regulation or a previous judicially approved settlement.

Numerous Circuit Court decisions overturned *Castro-Tum*. In 2019, the Fourth Circuit in *Romero v. Barr* held that the language "may take any action…..appropriate and necessary for the disposition" of the case" at 8 CFR §§ 1003.1(d)(1)(ii) & 1003.10(b) unambiguously confers upon IJs and the BIA the general authority to administratively close cases. *Meza-Morales v. Barr*, decided by the Seventh Circuit in 2020, also concluded that the "immigration regulations that grant immigration judges their general powers broad enough to implicitly encompass that authority." Most recently, the Third Circuit in *Sanchez v. Attorney General*, held that 8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously grant IJs and the BIA general authority to administratively close cases by authorizing them to take "any action" that is "appropriate and necessary" for the disposition of cases. The Court in *Sanchez* relied on the Supreme Court's 2018 decision in *Kisor v. Wilkie*, which held that an agency's interpretation of its own regulations will only be entitled to deference if the following criteria are met: i) that the regulation is "genuinely ambiguous" — the court should reach this conclusion after exhausting all the "traditional tools" of construction; (ii) if the regulation is genuinely ambiguous, whether the agency's interpretation is reasonable; and

(iii) even if it is a reasonable interpretation, whether it meets the "minimum threshold" to grant *Auer* deference, requiring the court to conduct an "independent inquiry" into whether (a) it is an authoritative or official position of the agency; (b) it reflects the agency's substantive expertise; and (c) the agency's interpretation of the rule reflects "its fair and considered judgment."

We have advocated for Attorney General Garland to overturn *Castro- Tum* and reinstate its predecessor, *Matter of Avetisyan*, which held that the IJs and the BIA may administratively close removal proceedings, even if a party opposes, if it is otherwise appropriate under the circumstances, and that IJs or the BIA should weigh all relevant factors in deciding whether administrative closure is appropriate. In prior blogs, see here and here, we have argued that *Avetisyan* sets a more common sense standard for administrative closure that and would go a long way towards clearing the Immigration Court's backlogged dockets.

On July 15, 2021, the Attorney General issued a decision in *Matter of Cruz-Valdez* that takes exactly this position, overruling *Castro-Tum* in its entirety and holding that "mmigration judges and the Board should apply the standard for administrative closure set out in *Matter of Avetisyan*..." The Respondent in the case was a Mexican national who had moved for administrative closure of his case while he filed a Form I-601A, Application for Provisional Unlawful Presence Waiver, with USCIS. Pursuant to 8 CFR § 212.7(e)(4)(iii), a noncitizen is not eligible for an I-601A waiver "unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the application". Respondent's motion was denied by the IJ and the BIA on appeal on the grounds that *Castro-Tum* prevented administrative closure of the case.

AG Garland's decision noted that three courts of appeals have rejected *Castro - Tum*, "holding that administrative closure is 'plainly within an immigration judge's authority' under Department of Justice regulations", while only the 6th Circuit upheld it in *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020). Even the 6th Circuit eventually ruled that IJs and the BIA do have the authority to administratively close cases for the purpose of allowing noncitizens to apply for provisional unlawful presence waivers, however. *See Garcia-DeLeon v. Garland*, No. 20-3957 (6th Cir. 2021). The decision also pointed to the 2020 DOJ final rule codifying *Castro-Tum*, *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81588, 81598 (Dec. 16, 2020), which is currently the subject of a nationwide preliminary injunction and

undergoing reconsideration by the DOJ, as further justification for overruling *Castro-Tum*. Because *Castro-Tum* departed from longstanding practice regarding administrative closure, AG Garland held that IJs and the BIA should revert to the standards for administrative closure laid out in cases like *Avetisyan*.

Though largely a victory for administrative closure, AG Garland's decision will not apply in the 6th Circuit, which has upheld *Castro – Tum*. The Sixth Circuit in *Hernandez-Serrano v. Barr* viewed 8 CFR §§ 1003.10(b) and 1003.1(d)(1)(ii) as unambiguously precluding a general administrative closure authority. The Supreme Court held in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005) that an agency need not acquiesce to a circuit court's interpretation of an ambiguous statute. However, even if *Brand X* applies to an ambiguous regulation rather than a statute, it probably cannot be harnessed here by the Attorney General to reinterpret the relevant regulatory provisions as conferring on IJs and the BIA the authority to administratively close cases because the Sixth Circuit appears to have found that those provisions were not, in fact, ambiguous. Therefore, the AG Garland in *Matter of Cruz-Valdez* appears to have correctly ascertained that this decision to overturn *Castro Tum* would not apply in the Sixth Circuit. One solution to this dilemma is the promulgation of a new regulation that would supersede the Sixth Circuit's unfavorable interpretation. Indeed, rulemaking in this area is already under consideration, and formed one of the principal bases for the AG's decision in *Matter of Cruz-Valdez*.

Though not without some limitations, AG Garland's decision to withdraw *Castro-Tum* and reinstate *Avetisyan* should be celebrated. This decision will help to relieve the immigration court backlog, and will aid in the adjudication of removal cases that require the resolution of questions not within the jurisdiction of IJs or the BIA. As such, *Matter of Cruz-Valdez* is an important step towards President Biden's goal of returning to a fair and humane immigration system.

(This blog is for information purposes, and should not be relied upon as a substitute for legal advice).

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