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US IMMIGRATION & NATIONALITY LAW

REMEMBERING MARK VON STERNBERG THROUGH MATTER OF RECINAS

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By Cyrus D. Mehta

I write this blog in fond memory of Mark Von Sternberg who passed away on May 16, 2023. Mark was a brilliant lawyer, scholar and writer who worked very hard on behalf of the most vulnerable immigrants. He was a Senior Attorney with Catholic Charities Community Services/Archdiocese of New York where he concentrated his practice in defending noncitizens in removal proceedings. Mark was also an adjunct professor of law at Pace University School of Law and St. John's University School of Law. He wrote extensively, particularly in the areas of refugee law, international humanitarian law, and human rights. Mark was universally respected by all – lawyers, students and even judges - for his kindness, compassion and humanity.

As the Chair of the annual Basic Immigration Law conference of the Practicing Law Institute (PLI), I always made sure that Mark was on the faculty where he usually spoke on Cancellation of Removal under the Immigration and Nationality Act. We know how difficult it is for non-lawful permanent residents to win cancellation of removal under INA 240A(b). In addition to demonstrating ten years of physical presence in the United States, and good moral character, the respondent seeking cancellation must also establish "exceptional and extremely unusual hardship" to the qualifying relative under INA 240A(b)(1)(D). The Board of Immigration Appeals (BIA) has set a very high bar for establishing "exceptional and extremely unusual hardship" as in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001) and *Matter of Andaloza*, 23 I&N Dec. 319 (BIA 2002). In both these cases the hardship that would have resulted to the minor US citizen children of the parent to Mexico was not sufficient notwithstanding the lower standard of living they would face in that country.

However, *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002) is one of very few decisions of the BIA which found that the "exceptional and extremely unusual hardship" standard had been met. This case involved a Mexican woman who was the mother of six children four of whom were US citizens. She was able to show that if she was removed to Mexico, she would not be able to support her children. She was divorced from her husband who was the father of the children and had a small business that generated profits of $400-$600 per month. As a single mother, the BIA found that she would find it difficult to provide support and a safe shelter for her children in Mexico.

The BIA noted the hardship of the children in Matter *of Recinas* as follows:

> *"The respondent's ability to provide for the needs of her family will be severely hampered by the fact that she does not have any family in Mexico who can help care for her six children. As a single mother, the respondent will no doubt experience difficulties in finding work, especially employment that will allow her to continue to provide a safe and supportive home for her children."*

Mark viewed *Matter of Recinas* from an international law and human rights point of view. His article in one of the PLI conference handbooks, *see* "Cancellation of Removal Under the Immigration and Nationality Act: Emerging Restrictions on the Availability of 'Humanitarian' Remedies", Chapter 20, Basic Immigration Law 2015, illustrates how one can make an effective argument for meeting the onerous hardship standard:

> *"The case is a constructive lesson that Cancellation of Removal, Part B, like the suspension remedy, can be based on economic hardship. There must be a showing, however, that hardship anticipated is more than comparative hardship. Comparative economic hardship refers to the situation where the applicant's situation in his/her country will be less favorable, in economic terms, than it would be in the United States. Rather, using standards of "absolute" economic hardship, it must be demonstrated that the respondent's predicate relatives will suffer significant deprivations – e.g. that because of adverse economic conditions, there will be substantial impact on a relative's right to adequate nutrition, adequate health car, adequate housing and a reasonable standard of living."*

Mark thus provided practitioners with guidance on how to distinguish their cases from *Matter of Monreal* and *Matter of Andaloza* by showing that the qualifying US citizen children would face absolute economic hardship rather than comparative economic hardship if the parent got removed to a country that would be unable to provide a child with the basic rights to nutrition, health care and education. His article also pointed to *Cabrera-Alvares v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005) where it was plausibly argued that customary international law should play some role in the "hardship" analysis, including the mandate of the Convention on the Rights of the Child that the "best interests of the child" be observed in all instances, although in this case, the Ninth Circuit noted that the best interests of the child were factored when ordering the removal of the parent. Also of persuasive guidance, according to Mark's article, is the customary law emanating from the International Covenant on Economic, Social and Cultural Rights (ICESCR), which emphasizes that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." If the rights under the ICESCR, inspired by Roosevelt's Four Freedoms, specifically the right to freedom from hunger (art 11), the right to enjoy the highest standard of physical and mental health (art 12) and the right to education (art 13) are not protected in the state of return then the case is appropriate for humanitarian relief cancellation of removal. Mark forcefully pointed this out in the article and also stated in his lecture that there needs to be a fundamental infringement of certain basic human rights to meet the economic hardship standard for cancellation of removal.

Mark's refreshing interpretation of *Matter of Recinas* from an international law perspective at a conference for beginner lawyers was a teaching moment even for an experienced practitioner like me. Mark has inspired a whole generation of lawyers who were his colleagues or students. I am one of them. Mark will forever be remembered by us who will emulate him to effectively advocate on behalf of vulnerable immigrants and find creative ways to interpret the law so that they can get humanitarian relief.