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

CHALLENGING THE FOREIGN POLICY GROUND OF REMOVABILITY IN DEFENSE OF FREE SPEECH AND THE RIGHTS OF GREEN CARD HOLDERS

Posted on March 16, 2025 by Cyrus Mehta

By Cyrus D. Mehta and Kaitlyn Box*

On March 8, 2025, DHS arrested Mahmoud Khalil, a Columbia University graduate and Palestinian activist, and purportedly revoked his green card. Khalil was detained under INA 237(a)(4)(C)(i) that provides for the deportation of a noncitizen if the Secretary of State has determined that their presence or activities would have adverse policy consequences. The Notice to Appear (NTA) issued to Khalil was sloppily drafted; clause 3 is particularly disjointed and includes a reference to a noncitizen who "was admitted to the United States at unknown place on or about unknown date as a unknown manner", language wholly inapplicable to Khalil. Moreover clause 3 also states that he adjusted his status to permanent residence under INA 212(a)(3)(C), which makes no sense. There is no basis to adjust status to permanent residence under INA 212(a)(3)(C).

Clause 4 of the NTA invokes INA 237(a)(4)(C)(i) that provides for the deportation of a noncitizen if the Secretary of State has determined that their presence or activities would have adverse policy consequences. Facially, INA 237(a)(4)(C)(i) renders it difficult for a respondent to challenge a negative determination. Although the government must prove through clear and convincing evidence that a green card holder is deportable, the Secretary's determination meets that heavy burden based on a 1999 BIA precedent, *Matter of Ruiz-Massieu*.

The statute may nonetheless provide Khalil some hope for challenging his detention and removal. INA 237(a)(4)(C)(ii) contains a freedom of speech and association safe harbor incorporated by reference to the inadmissibility

provisions at INA 212(a)(3)(C)(iii) prohibiting deportation "because of the alien's past, current, or expected beliefs, statements or associations, if such beliefs, statements, or associations would be lawful". In order to invoke an exception for the safe harbor protection, the Secretary of State must "personally determine that the alien's presence would compromise a compelling US foreign policy interest." According to an AILA Advisory, in drafting this provision, Congress replaced the phrase "seriously adverse" with "compelling", and required the government to prove an actual compromise to U.S. foreign policy rather than merely "potential" compromise, thereby establishing a stricter standard. In a conference report issued at the law was passed, Congress explained how this standard should be applied to protected speech:

"It is the intent of the conference committee that this authority would be used sparingly and not merely because there is a likelihood that an alien will make critical remarks about the United States or its policies. … Furthermore, the conferees intend that the "compelling foreign policy interest" standard be interpreted as a significantly higher standard than the general "potentially serious adverse foreign policy consequences standard."

Congress considered examples that might meet the "compelling" standard, such as when a noncitizen's presence would violate a treaty or international agreement that the United States is a party to or the admission of the former Shah of Iran into the U.S. for medical treatment in 1979, which sparked the Iranian Hostage Crisis, according to the AILA Advisory.

As yet, Khalil does not stand accused of having engaged in unlawful activities (*See* Arulanantham and Cox, March 12, 2025, Justsecurity.org). There is thus a chance that he could avail of the safe harbor provision. However, Secretary Rubio's letter asserting that Khalil's presence would compromise a compelling US foreign policy interest has not yet been made public (if at all there is such a letter) as of the date of this blog, and there is similarly no evidence that Rubio notified his determination to the chairmen of the Judiciary and Foreign Affairs Committees of the House and to the Judiciary and Foreign Relations Committee of the Senate under INA 212(a)(3)(C)(iv). If Rubio issued this letter after March 9, the date when the NTA was served, this oversight could potentially provide a basis for termination of the removal proceedings with prejudice, along with the sloppily drafted clause #3 in the NTA. Moreover, letter of the Secretary of State in *Matter of Ruiz-Massieu* was quite detailed. If there is a letter from Rubio that was hastily written and flimsy, this too could be the basis of a challenge that it

does not meet the “compelling” standard.

Because Khalil is a green card holder, he also has a strong basis to distinguish his case from *Matter of Ruiz-Massieu*. Ruiz-Massieu, a Mexican official, entered the US as a temporary visitor and was apprehended a day after he arrived based on accusations of corruption. Khalil, meanwhile, is a lawful permanent resident who engaged in constitutionally protected speech. Perhaps, a courageous Immigration Judge (IJ) will be persuaded by this argument distinguishing Khalil's case from *Ruiz-Massieu* and terminate the removal proceedings. Even if the IJ denies, Khalil can appeal to the Board of Immigration Appeals, where he will probably also lose, and then to the Court of Appeals. If his hearing is in Louisiana, the 5th Circuit will not be as friendly as the Second Circuit, assuming he can successfully transfer to New York if his habeas petition in the Southern District of New York prevails.

Khalil has a very good chance of constitutionally attacking INA 237(a)(4)(C) in a court of appeals on grounds that it violates his First Amendment rights as an LPR as established by the Supreme Court in *Bridges v. Wixon*, and is also void for vagueness. A federal district court has also found the statute unconstitutional (the judge Maryanne Trump Barry who made the ruling was none other than Trump's late sister) in 1996 in *Ruiz Massieu v. Reno*. The court held that the statute was unconstitutional because it impermissibly vague, deprives noncitizens of a meaningful opportunity to be heard, and represents an impermissible delegation of legislative power to the executive, stating that the provision: “represents a breathtaking departure both from well established legislative precedent which commands deportation based on adjudications of defined impermissible conduct by the alien in the United States, and from well established precedent with respect to extradition which commands extradition based on adjudications of probable cause to believe that the alien has engaged in defined impermissible conduct elsewhere.” The court’s holding was later reversed by the Third Circuit Court of Appeals on other grounds. If the Trump administration prevails, who is to stop them from using it, for example, against a noncitizen who promotes green technology because if undermines the policy objective of promoting fossil fuels of this administration?

While Khalil has an uphill climb, he does have opportunities for challenging his deportation in Immigration Court first, the Court of Appeals, and even in the Supreme Court. The robust dissent of BIA members Rosenberg and Schmidt will also provide ammunition to attack the statute in the Court of Appeals. The

dissent disagreed with the majority's position that the Secretary of State's letter alone "was conclusive and dispositive on the issue of deportability, and that the Immigration Judge erred in requiring the Service to provide something more than the Secretary's letter to satisfy its burden of proving, according to the language of the statute, that 'the Secretary of State has reasonable ground to believe would have potentially serious adverse policy consequences.'" Board Members Rosenberg and Schmidt instead argue in the dissent that the decision of the IJ should be adopted, which held that "the plain language of section 241(a)(4)(C)(i) requires that the Service prove (1) the Secretary's belief; (2) the Secretary's concern regarding the respondent's presence in this country; and (3) the 'reasonable ground to believe' that the respondent's presence would have serious adverse foreign policy consequences."

It is important that Khalil successfully challenges the deportation ground against him in order to uphold the right to free speech and the rights of green card holders to express them without fear. Even if one does not agree with the speech, and finds it repugnant, so long as the speech is lawful, the government should not have the power to retaliate by detaining and deporting a noncitizen. If the government has the power to retaliate against noncitizen green card holders, even US citizens will no longer be immune from similar retaliation.

*Kaitlyn Box is a Partner at Cyrus D. Mehta & Partners PLLC.

A version of this post was published on LinkedIn at https://www.linkedin.com/pulse/lets-fight-uphold-our-rights-free-speech-green-card-holders-mehta-ngede/?trackingId=RzyvcsXtR6C56C5VSuOWMw%3D%3D