Immigration Monthly

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- **Judge Alito On Immigration Law by *Cyrus D. Mehta***
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Judge Alito On Immigration By *Cyrus D. Mehta*

Judge Alito, who serves on the US Court of Appeals for the Third Circuit, is President Bush's nominee for the Supreme Court to replace Justice Sandra Day O'Connor. As the Third Circuit has a heavy immigration case docket, he has had an opportunity to hear and decide important cases concerning immigration law. This article will briefly analyze some of his opinions, which could provide a glimpse on how he could potentially rule in an immigration case if he became a Supreme Court Justice.

I. Gender-based Asylum - Perhaps, Judge Alito's most important and positive contribution to the development of asylum law was his opinion in *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). In that case, petitioner Parastoo Fatin appealed to the Third Circuit over the denial of her application for political asylum, withholding of deportation and suspension of deportation by the Board of Immigration Appeals (BIA). With regard to her asylum claim, which is the most significant piece of the decision, Fatin claimed that she had a well-founded fear of persecution if she returned to her native country of Iran. She stated the grounds that she would face persecution in Iran were on account of her "membership of a particular social group and on the basis of her political opinion." *Id.* at 1239. She claimed that she was a member of "the social group of the upper class of Iranian women who supporter the Shah of Iran, a group of educated Westernized free-thinking individuals." *Id.* She also claimed that she had a "deeply rooted belief in feminism" and in "equal rights for women, and the right to free choice of any expression and development of abilities, in the fields of education, work, home and family, and all other arenas of development." *Id.*

Judge Alito, who wrote the opinion for the unanimous three-judge panel, carefully analyzed the meaning of "particular social group" under the UN Convention Relating to the Status of Refugees as well as the BIA's interpretation of the term in *Matter of Acosta*, 19 I&N Dec 211, 233 (BIA 1985). In *Acosta*, the BIA defined a "particular social group" as "a group of persons all of whom share a common, immutable characteristic." *Id.*. The BIA further explained that "the shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." *Id.* At 1239-1240. Finally, "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences," according to the BIA in *Acosta*.*Id.*at 1240. Judge Alito held that Ms. Fatin could qualify as a member of the particular social group by virtue of being a woman in Iran because *Acosta* clearly "mentioned 'sex' as an innate characteristic that could link the members of a 'particular social group.'" *Id.* Furthermore Judge Alito agreed with Fatin that she could qualify as a member of sub groups too, namely, being an Iranian who refuses to conform to the government's gender-specific laws and social norms.

What is remarkable about this opinion is that the definition of "particular social group" was interpreted to broadly include "women" who opposed the prevailing social norms in Iran. Unfortunately, Ms. Fatin still lost in the Third Circuit despite being able to qualify as a

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member of this particular social group. According to the opinion, Ms. Fatin would not face persecution in Iran. Judge Alito favored the narrower definition of persecution, again defined in *Acosta*, to include "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom." *Id.* On the other hand, *Acosta* suggested "generally harsh conditions shared by many persons do not amount to persecution." *Id.* Thus, if Ms. Fatin complied with the prevailing norms in Iran, which was to wear the chador or the traditional veil, that in itself would not give rise to the level of persecution for an asylum claim. According to Judge Alito, the record did not clearly reflect whether Ms. Fatin would disobey the laws, which if she did, could have given rise to persecution. *Id.*at 1243. Although what constitutes persecution was defined narrowly, *Fatin v. INS* is viewed as a seminal decision in the gender based asylum arena as it broadly construed the "particular social group" definition to include women who are in defiance of the social norms of a country.

II. Asylum Based on Coercive Family Planning Policies - Contrast *Fatin v. INS* with *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004), pertaining to a claim by a Chinese national that his fiancée's forced abortion at the hands of the Chinese government officials could give him a claim for asylum under a 1996 statutory amendment to 8 USC §1101(a)(42). This amendment, incorporated as an independent ground for asylum, persons who were forced to have an abortion or undergo coercive sterilization, or feared having to undergo such procedures or were subject to persecution for resisting such procedures. 8 USC §1101(a) (42). At issue in *Chen* was whether a Chinese national could qualify for asylum based on his fiancée's forced abortion in China. Earlier, *in Re C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), a spouse in a similar situation could establish asylum if the other spouse was forcibly sterilized in China on the ground that "past persecution of one spouse can be established by coerced abortion or sterilization of the other spouse." *Chen*, 381 F.3d at 225. At his initial hearing on his asylum claim, the Immigration Judge (IJ) granted Chen's claim for asylum although he had never formally married. However, the BIA reversed the decision holding that *C-Y-Z-* had not been extended to include unmarried partners. Judge Alito, in writing the unanimous opinion for the Third Circuit and applying *Chevron* deference, agreed with the BIA's interpretation of limiting *C-Y-Z-* to married people as it contributed to efficient administration and avoided difficult and problematic factual inquiries pertaining to determining relationships between unmarried people.

While Judge Alito acknowledged that the use of marital status is problematic, he noted that the marital relationship served as a predicate for obtaining benefits in many areas of the law such as income tax, welfare benefits, property, inheritance, etc. Even with respect to immigration benefits, his opinion cited *Fiallo v. Bell*, 403 US 787 (1977), where the Supreme Court upheld the constitutionality of provisions that excluded illegitimate children and their fathers but not

illegitimate children and their mothers from special preference immigration status. Furthermore, the fact that Chen's inability to marry his fiancée because he did not meet the minimum marriage age in China, 23 for females and 25 for males, did not affect the outcome. Even if the higher ages were contrary to American practices, it did not rise to the level of "persecution" for purposes of asylum, according to Judge Alito. *Id* at 228.

In *Chen v. Ashcroft*, Judge Alito placed a great deal of emphasis on the institution of marriage, and did not broaden the *C-Y-Z* holding to non-spouse partners. Such reasoning is also consistent with his dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991); *affirmed* 505 U.S. 833 (1992). *Casey* involved the constitutionality of a Pennsylvania law that required a married woman who was having an abortion to, *inter alia*, have notified her husband about the intended abortion. The majority in *Casey* found this requirement to be an "undue burden" on the woman's ability to have an abortion and held the provision unconstitutional under a strict scrutiny standard. Judge Alito, on the other hand, disagreed that the law caused an "undue burden" as it did not prohibit or severely limit abortions and instead applied the "reasonably or rationally related to a legitimate state interest" test. *Id* at 726. Under the lower standard, Judge Alito held that the state had a legitimate interest in furthering the husband's welfare of a fetus he has conceived with his wife. The common theme in both *Chen* and *Casey* is the emphasis on the institution of marriage, which was paramount and overrode countervailing hardships faced by the plaintiffs in both cases (See NYT, A. Liptak, "Court in Transition: The Record" 11/3/05, which also states that "[a]fter abortion, the legal definition of marriage may be the most divisive issue in American law, and Judge Alito will almost certainly hear cases concerning the rights of gay and lesbian couples if he is elevated to the Supreme Court.) Because *Chen* was not married to his fiancée who was forced to have an abortion, he was unable to claim asylum despite the acknowledged fear that he faced if returned to China. In *Casey*, despite evidence that the notification requirement would cause untold hardships to women and inhibit them of their reproductive freedom guaranteed under *Roe v. Wade*, 410 US 113 (1973), Judge Alito opined that the State has a legitimate interest in the husband's concern for the welfare of the fetus he had conceived with his wife.

On the other hand, Judge Alito has readily upheld asylum claims of people who were actually forced to undergo cohesive family planning measures in China despite a finding that the applicant's testimony was not credible. In *Ling Zhang v. Gonzales*, 405 F.3d 150 (3d Cir. 2005), Judge Alito overturned the order of the BIA denying asylum and withholding removal to Zhang who had been subjected to a forced abortion. The Chinese family planning authorities also demanded that she or her husband be sterilized to prevent any further violations of the country's one-child policy. In addition to her testimony, she provided several documents to corroborate her claim, including a receipt indicating that

she was fined Y3000 for removing an IUD without permission and another receipt showing that Zhang was fined Y5000 for attempting to give birth secretly. She also submitted a birth control surgery certificate indicating that an abortion had been conducted on her and an IUD installed. Another document was a notice accusing Zhang and her husband alleging that she had given birth to two boys and that she must pay a fine of Y36000 within 30 days. This document also ordered her to go to a local hospital for a sterilization operation. It is not clear whether the IJ admitted the documents into the record. However, the IJ made reference to an immigration regulation, 8 CFR §287.6, which required authentication of such documentation by an officer in the US Foreign Service. It was acknowledged at the hearing that getting a document authenticated at the US Consulate in China is "almost impossible to get that actually done." *Id.*at 153. The IJ denied Zhang's claim on the ground that her story appeared "scripted" and "unbelievable" and that "neither the whole story or the pieces seemed plausible." *Id.* The BIA affirmed the IJ's denial. Judge Alito held that the Court could not sustain the exclusion of the documents without an explanation of the basis for the ruling. His opinion also noted 8 CFR § 287.6 was no longer an absolute rule of exclusion and is not the exclusive means of authenticating records. Even if the IJ had excluded the documents for reasons other than lack of authentication pursuant to the regulation, the IJ did not disclose the reasoning on this matter. After a detailed discussion of speculating why the IJ might have given less weight to the documents, Judge Alito still vacated the order and remanded the case to explain the basis for the exclusion of the documents. *See* also *Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004) (affirming 8 CFR §287.6 is not an absolute rule of exclusion, and is not the exclusive means of authenticating records before an immigration judge) (However, in an asylum case not related to abortion, *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003), Judge Alito disagreed with the majority that reversed the IJ's adverse credibility finding of an asylum applicant who was fleeing persecution from Guinea after the military beat and raped his wife. Judge Alito found the IJ's credibility finding reasonable and upheld Dia's denial of asylum. The majority rebuked Judge Alito for not adhering to the "substantial evidence" standard of review set by precedent, and remanded the case back to the IJ for further explanation as to the basis for not finding Dia's asylum claim credible).

III. Religious Workers - US immigration law provides permanent residency to people who can qualify as religious workers. Under 8 USC §1101(a)(27)(C), foreign nationals who qualify as "ministers" or who seek to work, either as professionals or otherwise, in a "religious vocation" or "religious occupation" for a religious organization can qualify for this special immigrant category. They must have also had two years of experience in these religious occupations immediately preceding the filing of the religious worker petition. As he did for "particular social group" in *Fatin v. INS*, Judge Alito recently expanded the definition of

"religious worker," broadening the group of foreign nationals who can quality for permanent residency under this definition. In *Camphill Soltane v. DOJ*, 381 F.3d 143 (3d Cir. 2004), Judge Alito, writing for the majority, held that a person in a "religious occupation" could also engage in secular activities. In that case, Camphill Soltane, a non-profit organization, providing services to young adults with mental disabilities, sought to sponsor Annagret Goetze, a German citizen, in the religious occupation of houseparent, music instructor, and religious instructor at the Camphill facility. According to the Court's decision, Camphill is rooted in the philosophy of "Anthroposophy" and the teaching of Rudolph Steiner. It seeks to create a spiritual community through cooperative life, social interaction, and spiritual activity. The Camphill movement is focused on Christianizing the ordinary aspects of life for the mentally handicapped as well as for the fully able members of the community.

USCIS had earlier denied the petition of Camphill Soltane. The Appeals Administration Office (AAO) affirmed the denial. The AAO found that the duties of the position involving the care of the mentally handicapped was a wholly secular function, even if the facility was operated by a charitable organization founded on religious principles. According to the AAO, this position did not require specific religious or theological training. Judge Alito agreed with Camphill Soltane that the AAO got it wrong, and stated that the AAO pre-determined its conclusion by only highlighting the secular aspects of Ms. Goetze's duties, but totally ignored its religious aspects. His opinion also pointed out that "religious translator" and "religious counselor," two examples of religious occupations in the regulation, were secular in character. Thus, a person could qualify in a "religious occupation" if the duties included both secular and religious aspects. As long as the job has "some religious significance, it could qualify as a religious occupation," according to the Judge Alito. *Id.*at 150. Finally, Judge Alito also questioned the AAO insisting that a religious occupation must be a traditionally full-time salaried position requiring specific religious or theological training. This appeared to be inconsistent with the list of religious occupations given in the regulation itself, which included positions such as "missionaries" who do not always receive salaries. The Court also observed that when the USCIS (formerly INS) promulgated the final rule on religious workers, it explicitly stated in the preamble that the rule had been revised to account more clearly for uncompensated volunteers, whose services are engaged but who are not technically employees. Although Judge Alito did not specifically dispute the AAO's contention that a religious occupation requires religious or theological training, he found that there was sufficient evidence in the record to suggest that Goetze's position required specific religious training. While the Court took pains to state that it was not creating a definitive test as to when a job may or may not be characterized as a "religious occupation," it ruled that the AAO had failed to show why the position offered by Camphill to

Goetze in this case did not qualify.

IV. Waivers and Habeas Corpus Jurisdiction - While Judge Alito has been generous in upholding certain political asylum claims and broadening the category for religious workers, this has not been the case with respect to aliens being deported on criminal grounds. In *Tipu v. INS*, 20 F.3d 580(3d. Cir.1994), petitioner Tipu, a Pakistani national, appealed the denial of relief from deportation under §212(c) of the INA (Act), 8 USC §1182(c), after he had been deported based on a drug charge conviction. On review, the majority concluded that the BIA failed to properly consider factors in Tipu's favor under the §212(c) waiver, such as the hardship Tipu's deportation would impose on the life-threatening nature of his brother's ill health as well as credible evidence that Tipu's role in the drug conspiracy was minor. The BIA also disregarded substantial evidence of Tipu's complete rehabilitation, and disregard of the fact that petitioner was an owner and operator of a taxicab. Based on these grounds, the majority reversed the BIA's determination and remanded the case for reconsideration of all these relevant factors. Judge Alito, in his dissent, disagreed by stating that the "majority has wandered well beyond the limited scope of appellate review that the court is permitted to exercise in a case like this." *Id.*at 587. Judge Alito agreed with the BIA's finding of one weighty factor against the petitioner, his drug conviction, as a serious adverse factor. Finally, Judge Alito disagreed with the majority's decision to vacate the BIA's decision because "they do not like the way the BIA weighed the various factors." *Id.*at 588. "In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates de novo appellate review" (citing *INS v, Rios-Pineda*, 471 US 444, 452, 85 L. Ed. 2d 452, 105 S. Ct. 2098 (1985)). *Id.* Prior to the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and IIRIRA, federal courts had jurisdiction to hear deportation matters in habeas proceedings through INA §106(a)(10), 8 USC §1105a(a)(10). This provision was repealed in AEDPA §401(e). IIRIRA §306 also withdrew judicial review of most immigration decisions and consolidated all claims in a petition for review to the Court of Appeals by modifying INA §242. In *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), the issue was whether habeas review under 28 USC §2241 remained for review of immigration matters. Petitioner Sandoval was subject to deportation because he was convicted of drug possession. His ability to apply for a waiver under INA §212(c) was suddenly eliminated by the passage of AEDPA §440(d). Sandoval, thus, claimed review of his eligibility of the waiver through habeas proceedings pursuant to 28 USC §2241. The majority agreed that AEDPA or IIRIRA did not strip the courts of habeas review absent clear Congress intent to the contrary. The Court further held that there was a sharp distinction between "judicial review" and the courts' power to entertain petitions for writs of habeas corpus. The Court also relied on similar precedents in the Second Circuit, *Henderson V. Reno*, 157 F.3d 106 (2d Cir. 1998) and the Ninth Circuit, *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998).

On the other hand, Judge Alito disagreed with the majority by interpreting AEDPA §401(e) as completely eliminating *habeas* proceeding before the court. Unlike *Felker v. Turpin*, 518 US 651 (1996), where the Supreme Court interpreted another court stripping provision of AEDPA - and held that Congress did not explicitly repeal *habeas* court jurisdiction and that such jurisdiction could not be repealed by "implication" - §106(a) expressly precluded a district court from exercising *habeas* jurisdiction under the circumstances in this case. Section 106(a) was distinguishable from the other court stripping provision interpreted in *Felker v. Turpin*, which was relied upon by the majority. That provision, 28 USC §2241(b)(3)(E), precluded Supreme Court review of a court of appeals order denying a second or successive habeas, but did not state that the Supreme Court could not review an original habeas proceeding, and the Court refused to conclude that §2241(b)(3)(E) implicitly effected the result. To his credit, however, Judge Alito conceded that petitioners could bring similar claims through a petition before the Court of Appeals, instead of a habeas, and that a prior decision, *Morel v. INS*, 144 F.3d 248 (3d Cir. 1998), should be overruled because it prevented a petitioner from bringing a non-constitutional claim to the Court of Appeals. Ultimately, the Supreme Court upheld the majority's reasoning, and not Judge Alito's dissent, in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001). In *St. Cyr*, the Supreme Court affirmed that habeas review and judicial review are separate and Congress did not preclude habeas review of pure questions of law that arose during removal proceedings. *Habeas* may also be used to "challenge the Executive interpretations of the immigration laws" including "questions of law that arose in the context of discretionary relief." *Id* at 283.

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