

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Memorandum

To: District Court Clerks

From: Charles R. Fulbruge III

Date: May 31, 2005

Re: Real ID Act



On May 11, 2005, "The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005," also known as The Real ID Act, became law. Section 106 of the act has a major impact on courts of appeals. It provides as follows:

(c) TRANSFER OF CASES. If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by this section, or under section 309 (c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S. C. § 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242. . . .

This section raises numerous questions of both substance and procedure which we bring to your attention in the discussion below.

I. Transferring Cases

After reviewing the AO's May 25, 2005 memo, and participating in a conference call on May 25, there is a general consensus district courts will transfer cases under the act after review by a district or magistrate judge. Individual district courts will determine whether transfer review will be undertaken *sua sponte* by the court, or on motion

by the U.S. Attorney or the petitioner's attorney. Current record keeping does not identify this specific type of case, so we do not know how many cases might be involved. To date we have received four transfers, one from the Eastern District of Louisiana and three from the Western District of Texas, El Paso.

II. Court to Which Transfer is Made

The act provides the cases shall be transferred "to the court of appeals for the circuit in which a petition for review could have been properly filed. . . ." Habeas corpus challenges to an order of removal, exclusion, or deportation are filed in the district court where the alien is located; petitions for review of such orders are filed in the district court where the final administrative order was issued. Thus, we expect there are some cases in the district courts in this circuit that should be transferred to another court of appeals, and *vice versa*. We ask our district courts to review the cases thoroughly enough to determine the proper court of appeals.

III. The Record

In most cases, the record in the district court will consist of little more than the Immigration Judge's decision and the BIA order affirming it. Our court will want more than what likely is available at the district court. The Justice Department will provide the necessary records but there will be a substantial delay. We ask that the district court send everything it has when the case is transferred. After we have reviewed the case, we will determine whether the administrative record is necessary and, if so, order it from DOJ.

IV. Stay of Removal

Often, habeas petitions are not filed until there is an order of imminent removal or deportation. The petitioner then also submits an application for stay of deportation. There is some sentiment that the district court should grant at least a temporary stay to prevent the issue from becoming moot during the transfer process. In most cases, it should not be necessary to do this as a routine matter. This court has recently adopted the four-factor test applied to preliminary injunctions, which is decidedly more favorable to petitioners. *Tesfamichael v. Gonzales*, — F.3d —, 2005 WL 1220939 (5th Cir. May 24, 2005). It should be relatively easy for the district courts to determine whether a stay is warranted on the merits without having to grant a stay automatically in every case.

V. Limited Transfer

The act specifies that, if a habeas petition in the district court attacks both the order of removal, exclusion, or deportation and the fact of detention, only the portion dealing with the order of removal, etc. can be transferred. The detention challenge will remain with the district court to be decided separately and the court of appeals will have no jurisdiction

over that portion of the case unless and until the district court has entered a final judgment that has been appealed.

As we get more information and experience, we may supplement this memo. If you have questions, please contact Bill Zapalac, Counsel to the Clerk at (504) 310-7660.

Sincerely,

A handwritten signature in black ink that reads "Fritz Fulbruge". The signature is written in a cursive, slightly slanted style.

cc: Bill Zapalac