DHS v. Thuraissigiam: Supreme Court Upholds Limited Review Options for Certain Asylum Seekers

On June 25, 2020, the Supreme Court issued its opinion in *DHS v. Thuraissigiam*, a dense case involving the Writ of Habeas Corpus, the Suspension and Due Process Clauses of the United States Constitution, and the statutory and regulatory schemes of requesting asylum at the southern border.

Applicable Laws

If an immigration official apprehends a noncitizen who has just unlawfully crossed the southern border, that noncitizen may be subject to a streamlined set of rules called "expedited removal." At its core, the expedited removal program strips from the noncitizen the otherwise-available rights to petition for release from custody or appear at a hearing before an Immigration Judge. INA § 235(b)(1)(A)(i). The immigration official simply issues the noncitizen a removal order and expels her from the United States, sending her back to her native country with a 5-year banishment on reentry. *Id.* at § 212(a)(9)(A)(i)(I). However, if the noncitizen expresses an intention to apply for asylum or a fear of persecution, she is referred to an asylum officer for a "credible fear interview." *Id.* at § 235(b)(1)(A)(ii).

If the noncitizen fails her credible fear interview, she can seek review of that decision before an Immigration Judge. INA § 235(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g)(1). If the Immigration Judge affirms the denial, there is no right to take a further, administrative, appeal; the noncitizen is simply returned to immigration officials for removal from the United States. *Id.* at § 1208.30(g)(2)(iv)(A).

The noncitizen may elect to take the matter to a federal circuit court of appeals via a petition for writ of habeas corpus, *see* 28 U.S.C. § 2241. Yet, the review is extremely narrow and circumscribed. Specifically, review is only available on (1) whether the petitioner is, in fact, a noncitizen; (2) whether she was ordered removed under the expedited removal scheme; and (3) whether the petitioner can prove, by a preponderance of the evidence, that she is actually a permanent resident, asylee, or a refugee and therefore entitled to be admitted. INA § 242(e)(2)(A-C); *see also id.* at § 235(b)(1)(C). The merits of the noncitizen's credible fear interview are not subject to review. *Id.* at § 242(a)(2)(A)(iii).

The "Suspension Clause" of the United States Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2.

Finally, the Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

Factual and Procedural History

Vijayakumar Thuraissigiam ("Mr. Thuraissigiam") is a native and citizen of Sri Lanka. In January of 2017, he unlawfully crossed the southern border; an immigration official swiftly apprehended him and commenced expedited removal proceedings. Because Mr. Thuraissigiam expressed a fear of returning to Sri Lanka, an asylum officer conducted a credible fear interview. After failing that interview, he requested review by an Immigration Judge, who ultimately affirmed the

denial. Mr. Thuraissigiam then filed a habeas corpus petition in the United States District Court for the Southern District of California. There, the judge ruled for the government, holding that Mr. Thuraissigiam, in his complaint, attempted to challenge the merits of his credible fear process, something that is forbidden by federal statute. *See* INA § 242(a)(2)(A)(iii). The judge also found that the statutory scheme at INA § 242(e)(2)(A-C) did not violate the Suspension Clause. Mr. Thuraissigiam furthered appealed to the United States Court of Appeals for the Ninth Circuit. In a precedential opinion, the Ninth Circuit reversed and ruled for Mr. Thuraissigiam. It held that INA § 242(e)(2) did violate the Suspension Clause. 917 F.3d 1097, 1113-19 (2019). The Ninth Circuit also held that the government violated Mr. Thuraissigiam's rights under the Due Process Clause. On August 2, 2019, the government petitioned the U.S. Supreme Court for a writ of certiorari. The Court granted the government's petition on October 18, 2019, and oral argument was held on March 2, 2020.

Voting Breakdown at the Supreme Court

Justice Alito wrote the Opinion of the Court. Chief Justice Roberts, and Justices Thomas, Gorsuch, and Kavanaugh joined the opinion in full. Justice Breyer, joined by Justice Ginsburg, concurred only in the judgment. Justice Sotomayor, joined by Justice Kagan, dissented.

Majority Opinion of the Supreme Court

Writing for the Court, Justice Alito concluded that Mr. Thuraissigiam's case falls outside the scope of the Suspension Clause. As explained above, Mr. Thuraissigiam filed a federal habeas petition, following the Immigration Judge's affirmance of the asylum officer. The habeas writ provides a mechanism to determine whether the detention of an individual is lawful or unlawful. However, the Court concluded that Mr. Thuraissigiam simply was not seeking a determination on the propriety of his detention. Instead, he was trying to use the habeas writ to obtain a broader, more substantive, form of relief, specifically reexamination or relitigation of why he had a credible fear of persecution in Sri Lanka that could ultimately result in his being allowed to permanently reside in the United States. With the Court's conclusion that Mr. Thuraissigiam was not seeking relief that a court could grant through a habeas petition, there was nothing for the Suspension Clause to protect. Stated differently, according to the Court a habeas petitioner must be seeking "proper" habeas relief (i.e. release from unlawful detention) before the Suspension Clause applies.

Rejecting Mr. Thuraissigiam's arguments under the Due Process Clause, the Court grounded its reasoning in its long-standing rule that noncitizens at the border who have not acquired any domicile or residence in the United States are only owed the process afforded to them by Congress and the President through bicameralism. In other words, so long as immigration officials are following the laws, the Due Process Clause is satisfied. With that understanding, Justice Alito pointed out that Mr. Thuraissigiam was given all the rights he was entitled to receive, to wit: a credible fear interview and review by an Immigration Judge. Accordingly, he received due process of law.

Justice Breyer's Concurrence

The crux of Justice Breyer's concurrence is simple: The Court went way too far in its majority opinion. Justice Breyer reminds us that the Court agreed to review whether INA § 242(e)(2), as applied only to Mr. Thuraissigiam, violated the Suspension Clause. There was no need to make sweeping

statements on the reach of the Clause in circumstances that were not before the Court. For example, Justice Breyer ruminated about a noncitizen who enters unlawfully and starts a life in this country. Given that the expedited removal process can reach individuals who have been in the United States for up to two years, INA § 235(b)(1)(A)(iii)(II), what review, if any, would the Suspension Clause provide in this context?

Justice Sotomayor's Dissent

In dissent, Justice Sotomayor criticized the majority for cabining the scope of the Suspension Clause solely to petitions for release from custody. In her view, "[t]he Court has . . . never described release as the sole remedy of [habeas corpus]." Slip. op., at 7 (Sotomayor, J., dissenting) (internal quotation marks omitted). Instead, she believes release from custody is just but one form of relief that a court can properly grant in habeas corpus proceedings. She cites the Court's 2005 opinion in *Boumediene v. Bush*, 553 U.S. 723, 779, and its 2001 opinion in *INS v. St. Cyr.*, 533 U.S. 289, 302, 304-08, for support. "These precedents themselves resolve this case." Slip. op., at 33 (Sotomayor, J., dissenting).

On Mr. Thuraissigiam's claim under the Due Process Clause, Justice Sotomayor believes that once a noncitizen is physically present in the United States, whether through an unlawful or lawful entry, "at least some level of due process protections [apply]." *Id.* at 35. She rejects the majority's "legal fiction" that Mr. Thuraissigiam is akin to someone who is present at the international boundary, in which case no constitutional protections would attach. *Id.* at 36.

Conclusion

While the Supreme Court has settled the law in the circumstances of Mr. Thuraissigiam's case, that does not necessarily mean doom and gloom for all future cases. Going forward, practitioners should hone in on Justice Breyer's point that the Court granted certiorari to address only the circumstances of Mr. Thuraissigiam – an "as-applied" challenge of whether INA § 242(e)(2) is violative of the Suspension Clause. Nothing more. Accordingly, any pronouncement, broad or narrow, is dicta and not binding on a lower federal appellate or district court.