Twitter Thread by Matthew Hoppock

Matthew Hoppock
@MatthewHoppock

On Jan 4 the Eighth Circuit issued a pretty awful opinion on eligibility for a fraud waiver after a person is denaturalized for fraud, essentially endorsing gamesmanship by the DHS without notice. The case is Herrera Gonzalez v. Rosen.

Petitioner admitted she had gotten her permanent residence through fraud (which led to a criminal conviction and later denaturalization). The government charged her with removability for the fraud, and she applied for the waiver that is allowed under that section.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)

(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

After the judge had sustained the fraud charge, the DHS added a new charge that the marriage fraud conviction was a "crime involving moral turpitude." Then, at trial, the DHS withdrew the fraud charge, leaving only the CIMT charge, and argued there was no waiver for just the CIMT

Citing Matter of Tima, the Eighth Circuit agreed that the "fraud waiver" couldn't be used if the DHS plays this game of charging the same conduct under a different section, and that not doing that until the moment of trial didn't violate her right to due process.

There are problems with this. One is that Matter of Tima largely erases part of the fraud waiver statute - the part that says a fraud waiver under that section does waive other related grouns of removability. I wrote about it here when Tima was issued. https://t.co/XpKqeUVYFA

The BIA's decision in Tima doesn't even mention that last sentence of the fraud waiver statute, which pretty clearly says the fraud waiver can waive other related grounds of removability "directly resulting from" the act of fraud.

> A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

Another is that prior BIA precedent said the fraud waiver could waive related removability grounds, and Tima left those in place. E.g. Matter of K allowed the same fraud waiver to waive a separate ground of removability for a false claim to citizenship. https://t.co/oXDX2yprXP

A third problem - Justice Kagan pretty clearly rejected this practice in Judulang, calling this manner of charging the same conduct under different sections to get around waiver eligibility a "sport of chance."

332 U. S. 388, 391 (1947). We think the policy before us similarly flawed. The comparable-grounds approach does not rest on any factors relevant to whether an alien (or any group of aliens) should be deported. It instead distinguishes among aliens—decides who should be eligible for discretionary relief and who should not—solely by comparing the metes and bounds of diverse statutory categories into which an alien falls. The resulting Venn diagrams have no connection to the goals of the deportation process or the rational operation of the immigration laws. Judge Learned Hand wrote in another early immigration case that deportation decisions cannot be made a "sport of chance." See *Di Pasquale* v. *Karnuth*, 158 F. 2d 878, 879 (CA2 1947) (quoted in *Rosenberg* v. *Fleuti*, 374 U. S. 449, 455 (1963)). That is what the comparable-grounds rule

In this new decision, the Eighth Circuit doesn't address Judulang, the remaining text of the waiver statute, Matter of K, or the limitations of Matter of Tima. It just says if DHS chooses to change the charge from "fraud" to "CIMT" (even if for the same conduct), then no waiver.

The remaining problem is the court's due process analysis, which is all of a single sentence. Apparently the DHS changing which charge they're going to pursue on the day of trial "does not implicate" due process just because...

Finally, Herrera contends the Department's "sudden withdrawal" of the fraud charge violated her due process rights. She complains that she did not have notice of the "new case" against her and was unable to seek the fraud waiver. Herrera had notice, however, of the charge that she was removable based on crimes involving moral turpitude, so there was no due process problem with proceeding against her on that charge. That the Department's withdrawal of the fraud charge made Herrera ineligible to seek discretionary cancellation of removal does not implicate the Due Process Clause. Even if there were some theory under which the government could be required to pursue an additional charge of removability, an alien "has no protected liberty interest in discretionary relief from removal." *Patel v. Sessions*, 868 F.3d 719, 723 n.4 (8th Cir. 2017).

P.S. one last problem is the court's reliance on Matter of Koloamatangi. The BIA's decision in Matter of Agour seems to call into question the premise of Koloamatangi (without squarely addressing it). https://t.co/gSR0niKhB8

Koloamatangi says if you get your status through fraud, ur not "lawfully admitted for permanent residence" so ur ineligible for cancellation of removal. Agour assumed a fraudulent marriage still met that standard.

[2] The respondent's adjustment to the status of a lawful permanent resident on a conditional basis was obtained through her marriage to a United States citizen. Consequently, she became an alien "lawfully admitted for permanent residence," notwithstanding the conditions that remained. *See Matter of Paek*, 26 I&N Dec. 403 (BIA 2014).