Kerry v. Din, 13-1402
Argument: Feb. 23, 2015

Facts

Fauzia Din, a U.S. citizen, filed a visa petition for her husband Kanishka Berashk, a citizen and resident of Afghanistan. The State Department denied the petition nine months later citing a broad provision of the Immigration and Nationality Act that excludes aliens on terrorism-related grounds. When Berashk asked for clarification, he was told that the Embassy couldn't provide him with a detailed explanation of the denial.

After several other unsuccessful attempts to receive an explanation, Din sued, arguing that denying notice for aliens who are denied visas based on terrorism grounds is unconstitutional. The district court found that Din lacked standing to challenge the visa denial. The 9th U.S. Circuit Court of Appeals reversed and held that the government is required to give notice of reasons for visa denial based on terrorism grounds.

Question

Is the government required to allege what it believes an alien did that would render him ineligible for a visa based on terrorism-related ground under the Immigration and Nationality Act?

Associated Press
The Supreme Court on Capitol Hill in Washington in 2014.

Due process doesn't trump plenary power

By Michael Hethmon

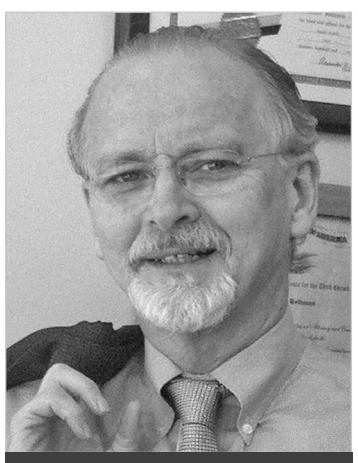
The 2nd U.S. Circuit Court of Appeals observed in *American Academy of Religion v. Napolitano* (2009) that "these cases [challenging the doctrine of consular non-reviewability] raise a host of issues." Indeed.

Fauzia Din is a naturalized refugee, resettled here after years in Pakistan. She is appealing the denial of an immediate relative visa for her Afghani husband, Kanishka Berashk, who has never been to the United States. After adjusting from refugee to permanent resident status, but while still a citizen of the country that persecuted her family under the Taliban regime, Din returned to marry a "longtime" family friend — an arranged union under a family law that would be repugnant to the Constitution in this country, but one which we recognize nonetheless by comity.

Din's visa petition was routinely processed by U.S. Citizenship and Immigration Services and the State Department's National Visa Center. But 10 months after Berashk appeared for a visa interview in Islamabad, he received a form notice that he was inadmissible and no waiver was possible.

Further inquiry produced an embassy email stating that the application was denied on terrorism-related grounds. Section 1182 of Title 8 is the immigration statute barring "inadmissible" aliens. Section 1182(a)(3) lists 10 categories of terrorist activity as bars to admission. The email explained the denial was not possible, citing 8 U.S.C. Section 1182(b)(3), a subsection on "notice of denials" that exempts consular officers from the general requirement to provide specific reasons for a visa denial, if made on "security and related grounds." The exemption also applies to exclusions on criminal grounds that do not apply to this couple, but could be affected if the U.S. Supreme Court accepts her theory of due process rights.

No party or amicus before the Supreme Court claims that the overseas husband has standing to contest the denial. If Berashk erred by omission on his visa application, he is also inadmissible. But Din, now a naturalized citizen, followed up with her own queries to the State Department and then Congress. When rebuffed, she sued by bootstrapping a novel Fifth Amendment due process claim onto the Supreme Court's 1972 holding in *Kleindienst v. Mandel* that when a visa is denied for "a facially legitimate and bona fide reason," the judiciary cannot "look behind the exercise of that discretion" nor "test it by balancing that justification" against the interest of the citizen asserting a constitutional right to benefit from the alien's presence.



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This case is not really about the relief she seeks, and only tangentially concerns U.S. counterterrorism operations. Din demands that the State Department provide her "some evidence" that her husband is inadmissible under one of the specific national security sub-grounds for inadmissibility. "Providing notice is important," Din argues, "because when a visa is refused, applicants can seek to overcome the ground for refusal."

Din has deployed a variant of the "good German" strategy, claiming that Berashk was just a government clerk under Taliban rule (a regime his wife's family had fled for their lives), whose lowly employment couldn't possibly constitute support for terrorism. But an obvious ground for denial would be employment in an official capacity by an iconic terrorist regime. U.S. inadmissibility laws don't exempt low-level Nazi or Khmer Rouge government clerks either.

There seems to be little debate among the circuits that under the "facially legitimate" standard, the consulate could have sustained the visa denial with as minimal a response as the newspaper articles cited to bar IRA terrorist supporter Gerry Adams in *Adams v. Baker* (1st Cir. 1990), the U.S. consulate in Switzerland's claim that local Islamist Tareq Ramadan was a Hamas donor in *American Academy*, or the U.S. consulate in a Mexican border town's claim in *Bustamante v. Mukasey* (9th Cir. 2008) that the DEA believed that the U.S. citizen's Mexican husband was involved in drug trafficking. Lacking independent evidence of bad faith on the part of the consulate, which Din was urged but did not provide to the district court, the most relief she could expect would be a slightly more detailed denial letter from the consulate.

Nonetheless, the Supreme Court has agreed to consider whether the liberty interest of marriage includes the due process right of a citizen to bring a spouse contracted in a foreign marriage to the U.S. for cohabitation, or expands the scope of judicial review to the factual basis for the denial. This expansion, however, would aggrandize federal judiciary power vis-à-vis Congress, by undermining a key obstacle to asserting long-arm jurisdiction over visa applications by overseas aliens.

That obstacle is the consular non-reviewability doctrine, a leading edge of the doctrine of congressional plenary power in immigration law. Consular non-reviewability dates only to the Progressive Era of immigration restrictions, culminating in the 1924 reforms, which moved the venue for legal screening of immigrants from Ellis Island to U.S. consulates overseas. But plenary power over immigration is imbedded in the constitutional DNA of the nation-state, as the expression of the sovereignty of the political branches of government. It has been asserted by authorities on international law from Grotius, Blackstone, Vatel, and the Framers of 1787, to the unbroken past century of Supreme Court cases stretching from *Fong Yue Ting v. U.S.* in 1893 to *Demore v. Kim* in 2003.

Din's amici correctly surmise that if contracting an overseas marriage — in this case, under the Islamist constitution of Afghanistan — can create a constitutionally protected immigration preference for the citizen spouse, Congress will lose power to regulate immigration as a political function. For all the happiness and marginal utility that marriage to a foreigner can bring, in constitutional terms, Din's claim elevates nepotistic rights over majority rule. Din's prominent amici from the open borders lobby and the immigration bar want to elevate her asserted liberty interest in conjugal immigration into the expanding penumbra of paramount due process rights of "freedom of personal choice in matters of marriage and family life." But if Congress is compelled by the Fifth Amendment to permit inadmissible aliens to immigrate as derivative beneficiaries of liberty interests like the one asserted here, the political rights of the democratic majority of Americans and their legislators are diminished.

The party whose position is most ambiguous is, unsurprisingly, the petitioner, the Obama administration. The administration is engaged in its own titanic struggle with Congress, between executive discretion and legislative plenary power over immigration removals. The president's commitment to chain migration as the future of the Democratic Party should jive nicely with Din's theory that spousal chain migration constitutionally trumps plenary legislative restrictions.

But the last thing Homeland Security wants is mandated judicial review of executive discretion over admissions, which it argues will "work a sea change in the law, creating obstacles" to presidential "plenary power over the Nation's borders and burdening the courts." The administration thus claims that *Mandel* was decided on a technicality, abuse of prior visa waivers by the communist applicant, not an infringement of the U.S. sponsor's First Amendment rights. The administration already supports judicial review of visa denials for spouses of gay citizens on due process unity grounds, but it tries to distinguish spousal denials on national security grounds as exempt from due process review. It advocates expanding the liberty interests in personal choice, but denies its relevance for immigration as a threat to executive prerogatives.

This is a bad case, and a constitutionally perilous one. In *American Academy*, the 2nd Circuit called Ramadan a "symbolic plaintiff." So is Din, but with much more at stake. No party represents the national interest of the citizenry, the collective majority with virtually no recourse to the courts on immigration controversies, who are left to pursue their interests through the plenary power under attack from different angles by Din and the president.

If the court expands due process to review of visa denials, both the political branches will be weakened. If it goes further to hold that judicial review of visa denials derives from a nepotistic due process right to family unity, it will degrade the status of the citizenry within their own republic.

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A right to know the basis for visa denial

By Bill Ong Hing

The U.S. Embassy's decision to deny a visa to Kanishka Berashk should be subject to meaningful judicial review. He and his U.S. citizen wife, Fauzia Din, deserve more than an email stating the visa was denied under a lengthy section of the Immigration and Nationality Act. Some reference to the factual basis for the denial should be required.

Berashk worked as a payroll clerk for the Afghan Ministry of Social Welfare from 1992 to 2003. From 1996 to 2001, the Taliban controlled Afghanistan, so Berashk's employment necessarily included work for the Taliban government. He performed low-level administrative duties. When he applied for his visa through his wife, Berashk fully cooperated and answered all questions about his work. After several months, he was informed that his visa had been denied under 8 U.S.C. Section 1182(a)(3)(B), a provision that lists a wide variety of conduct that renders an alien inadmissible due to "terrorist activities." The email to him added that it "is not possible to provide a detailed explanation of the reasons for the denial."

Fauzia Din has a right to bring this action. The U.S. Supreme Court has explained that marriage is the most important interpersonal relationship one can form, and the foundation of the family and our society. Marriage can fulfill this vital role only if spouses are at liberty to live together. Claiming this liberty interest can be satisfied if Din moves abroad to live with Berashk is disingenuous. The ability to flee from a jurisdiction that violates a fundamental right does not negate the violation. The Supreme Court has never excused an unconstitutional restraint in one jurisdiction when the affected individual could move elsewhere.

As U.S. citizen, Din is a "person" protected by the due process clause. Due process requires that the government provide notice of the basis for an action that invades a citizen's liberty and an opportunity for judicial review. That's the least it requires as a protection against arbitrary government action. A government allowed to act without explanation is free to act arbitrarily, heedless of the constraints that the legislature has imposed or that the facts may dictate.

The minimum process due in the immigration context, where the executive purports to apply statutory criteria, is judicial review to determine whether "some evidence" supports the government's action. *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927). This highly deferential standard is functionally equivalent to the review the Supreme Court gives to Congress' and the executive's exercise of discretion in the immigration context, which assesses whether a facially legitimate and bona fide reasons supports legislative or executive judgment. This is often referred to as deference to Congress' "plenary power" over immigration.

The process due in this circumstance was established in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Under *Mandel* review, the courts determine whether a "facially legitimate and bona fide" reason supports an admissibility determination affecting the rights of a U.S. citizen. This is the most deferential review consistent with due process. It allows a court to determine whether executive action accords with the law and is supported by "some evidence" or factual basis, without second-guessing the executive's factual determination. Such review appropriately accounts for and defers to the government's institutional interests while guarding against arbitrary action that may tear apart a family. Although this is a highly deferential standard of review, the executive must not infringe a liberty interest when there is no basis for its finding.

The Supreme Court has never held that Congress and the executive are wholly immune from judicial review when the constitutional rights of a protected person are at issue. To the contrary, Congress' plenary power to create immigration law remains subject to important constitutional limitations. Declining to hold that the executive could act "for any reason or no reason at all," *Mandel* looked only at whether there was a "facially legitimate and bona fide" explanation. The court did not look behind the reasons provided. Such review assesses whether the articulated factual basis — if assumed to be true — aligns with the statutory grounds for exclusion, properly construed. But here, the government has not offered a factual basis for the visa denial.

Courts have effectively understood the "facially legitimate and bona fide" review standard in this way and have had no trouble applying it as such. Their inquiry has been directed not to proving or disproving the alleged conduct, but instead to determining whether the government has identified a "properly construed" statute providing a ground for exclusion, along with a factual basis for concluding that the consular officer "knows or has reason to believe" that the visa applicant has done something fitting with the proscribed category. *Am. Acad. Of Religion v. Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009).

This standard calls for no more than the minimum that due process requires to guard against arbitrary action. Courts do not compel the issuance of a visa, but may issue declaratory relief. This protects against arbitrary government action without intruding upon the political branch's authority over immigration, foreign policy or national security.

The government argues that judicial review of security-based visa denials is particularly inappropriate. However, decades of experience establish that the federal judiciary is competent to adjudicate the kinds of disputes at issue here. In ideological exclusion cases based on security grounds, none have led to any discernible harm to legitimate government interests even when the courts consider sensitive and classified information. See, e.g., *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988). The courts have ample means to address the government's concerns about classified information.

The government is legitimately concerned with judicial second-guessing of decisions made by consular officers abroad relating to aliens' qualifications for admission, including national security and foreign policy interests. However, there is no doubt that consular officials frequently make dispositive errors, both legal and factual in nature, when resolving visa applications. Many of the governing statutory provisions are vague and broad, and judicial review can provide a valuable and essential check on official mistakes that can have shattering consequences on the lives of visa applicants and their families in the United States.

The utility of review of visa denials by consular officers is demonstrated by the review now available of the same legal issues when they arise in the removal setting. In one case, the government's terrorist group designation rested on evidence that one member of the group had committed violent acts. After the court reviewed the record, however, it became clear that the violent individual had acted either alone or with third-party support and had, in any case, died before the applicant's association with the group began. *Singh v. Wiles*, 747 F. Supp. 2d 1223, 1232 (W.D. Wash. 2010).

The government also has a haphazard approach to inadmissibility for providing "material support" to a terrorist organization. In one case, the agency denied an asylum application in part because the applicant allegedly solicited others in Iran to join the Mujahedin-e Khalq Organization (MEK), a terrorist group. But the 6th U.S. Circuit Court of Appeals noted that the MEK had not yet been designated a terrorist group at the time of the applicant's actions, the agency had not considered his testimony that he knew nothing of MEK's violent activities, and there was no evidence that the applicant himself had engaged in any terrorist acts. *Daneshvar v. Ashcroft]*, 355 F.3d 615, 628 (6th Cir. 2004).

The government's national security concerns do not allow the courts to close the courthouse doors to the constitutional claims of citizens. The federal courts are quite competent in resolving disputes touching on national security and foreign affairs. Din and Berashk have the right to require the government to make its allegations known.

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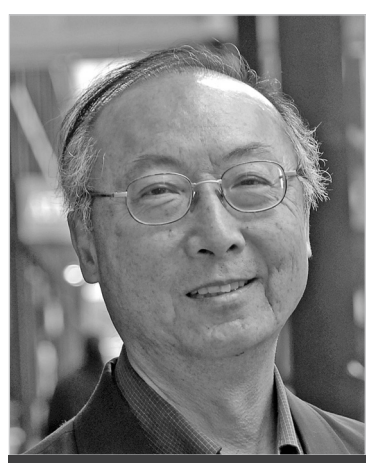

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