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Barriers to Return After Successfully Challenging a Removal Order from Outside the U.S.

**A summary of the complaint in
National Immigration Project v. DHS, No. 11-CV-3235 (S.D.N.Y., May 12, 2011)**

On May 12, 2011, the National Immigration Project, the ACLU Foundation, the Immigrant Defense Project, the Post-Deportation Human Rights Project, and Professor Rachel Rosenbloom filed a complaint against DHS, the DOJ and the State Department alleging inadequate response by the agencies to a Freedom of Information Act request for materials on the agencies' policy and practice of facilitating the return to the U.S. of individuals who successfully challenge their removal orders from outside the country.

The complaint and accompanying exhibits document the numerous difficulties individuals face in seeking to return to the U.S. after prevailing on a post-departure petition for review or motion to reopen or reconsider. The following summary is intended to assist attorneys who may wish to cite to facts in the complaint to support arguments for stays of removal or when asking a court to order the return of individuals who prevail from outside the country, as well as attorneys seeking guidance on how to facilitate a client's return. This summary is divided into the following sections: (A) General information on the barriers to return, (B) Information to support a motion for a stay of removal pending review of a removal order, (C) Information to support an argument that a federal court should order return of successful petitioners, and (D) Information on the procedure by which attorneys have succeeded in arranging return.

A. General information on barriers to return

1. Agency disclosures reveal that there is no policy for arranging the return of individuals who prevail in challenges to their removal orders from outside the U.S.

Although the agencies have failed to adequately respond to our FOIA request, the information that has been released shows a lack of any functional system for return. The following is the information the agencies have disclosed to date:

- Immigration and Customs Enforcement (ICE). ICE's Office of Principal Legal Advisor (OPLA) released 587 pages of records. (Complaint ¶ 52.)¹ Nowhere in the records is there an official statement of the agency's policy on return of individuals who win their cases from outside the country. (*Id.*) Instead, the records reveal the lack

¹ Unless otherwise noted, all citations are to Complaint, *National Immigration Project v. Department of Homeland Security*, No. 11-CV-3235 (S.D.N.Y. May 12, 2011).

of any formal policy as well as general confusion on the part of attorneys within DHS and the DOJ about how to return successful petitioners. For example, two sets of email correspondence show local DHS counsel unaware of the procedures for arranging return. (Complaint Ex. CC, Ex. DD.) In another email exchange, an OIL attorney sent repeated emails to DHS inquiring about return procedures after an immigrant's attorney called "every couple days" to ask when the client could return. The response from an attorney at DHS headquarters reads: "After internal discussion, it appears that the process we use is fort he [sic.] alien to be paroled" and goes on to state that the individual should work with the local DHS office to arrange parole. (Complaint Ex. AA.) Another set of emails reveals extensive discussion regarding how to respond to a journalist's inquiry on ICE's policy for arranging return. (Complaint Ex. BB.)

- Customs and Border Protection (CBP). CBP responded to the FOIA request by indicating that its Office of Field Operations, which oversees the entry of international travelers to the U.S., has "no set procedure" for admitting individuals who prevail in challenging their removal orders from outside the country but rather deals with each situation on a case-by-case basis. (Complaint Ex. R.) After plaintiffs appealed this determination, CBP conducted a new search of additional component agencies but could not locate any materials regarding policy or procedure for reentry of individuals whose removal orders are overturned. (Complaint Ex. S.)
- DOJ Civil Division and Office of Immigration Litigation (OIL). OIL disclosed its "Adverse Decision Procedures." The Procedures are a set of instructions for attorneys to follow when an adverse decision is received from a court of appeals. Nowhere in the instructions is there any mention of arranging the return of successful petitioners who are outside the country. Instead, the instructions focus primarily on procedures to determine whether the government should petition for certiorari. (Complaint Ex. FF.)
- DOJ Office of the Solicitor General (OSG). Although the Office of the Solicitor General told the Supreme Court in *Nken v. Holder* that "by policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States",² the OSG has refused to release the document that served as its basis for this statement. The OSG has identified four pages of responsive material related to the *Nken* case but is withholding the material as protected by attorney-client, attorney work product, and deliberative process privilege because the "documents were generated in connection with deliberations within the government concerning the *Nken* case." (Complaint Ex. V.) In other words, the OSG is arguing that the basis for its claim to the Supreme Court is a document that was only generated for purposes of the *Nken* litigation itself.

² Brief for Respondent at 44, *Nken v. Holder*, 129 S.Ct. 1749 (2009) (08-681).

2. Agencies repeatedly refuse to accept responsibility for arranging return. Although DHS, the DOJ and the State Department have all played roles in facilitating reentry, attorneys have been told by individuals at each agency that the agency is not responsible for facilitating return.

- Department of Justice. The DOJ has repeatedly told attorneys and courts that it cannot or will not facilitate return. (Complaint Ex. G, ¶ 11 (the DOJ told the Third Circuit that it had no obligation to facilitate return and that it was not the proper agency to issue the necessary paperwork for reentry); Ex. 12, ¶¶ 4-7 (OIL initially indicated it knew of no procedures to arrange return, then stated that local ICE would arrange return, and only after petitioner's attorney filed a motion with the circuit did OIL contact ICE headquarters so that return could be arranged); Ex. B, ¶ XIII (OIL attorney told petitioner's attorney that OIL did not have authority to facilitate return); Ex. H, ¶¶ 17-19 (Assistant U.S. Attorney told attorney he was no longer involved in the case after the circuit court issued its decision and did not know what to do to arrange return); Ex. AA at 2 (Email from OIL attorney describing conversation with immigrant's attorney: "I told him (yet again) that it is DHS, not me, that is going to be handling any potential re-entry, and that I didn't know how that process would work or how long it would take.")).
- Department of Homeland Security. DHS has also refused to accept responsibility for arranging return. (Complaint ¶ 26 (ICE Chief Counsel told immigration practitioners at a conference panel that the first point of contact for arranging return should be the DOJ, not DHS); Ex. G, ¶ 6 (ICE took the position that it had no obligation to return successful petitioner and instead suggested petitioner apply for visa from U.S. Embassy in Lagos, Nigeria); Ex. G, ¶ 25 (USCIS erroneously informed successful petitioner that he could not reenter the U.S. due to his removal order); Ex. L, ¶¶ 2-9 (ICE refused to arrange return of successful Supreme Court petitioner until attorney filed motion with the circuit and OIL intervened at the national level, and even after return plan was coordinated with ICE, petitioner was refused entry by CBP); Ex. B, ¶¶ XIII, XVI-XVII (DHS refused to arrange reentry of asylum applicant whose removal order was vacated and suggested instead that the individual apply for parole with USCIS, which was subsequently denied)).
- Department of State. U.S. Embassies have repeatedly told individuals and their attorneys that they cannot issue documentation necessary for return. (Complaint Ex. C, ¶¶ 12-21 (pro se individual visited the U.S. Embassy in Port-au-Prince on several occasions, presented a copy of the Third Circuit decision overturning his removal order, but was told by Embassy personnel that he did not have the necessary paperwork to return and that he would need a lawyer if he wished to be able to reenter the U.S.); Ex. J (counsel was told by the Consular Section of the U.S. Embassy in Port-Au-Prince first that only USCIS could process the paperwork necessary for return and then that the client, a lawful permanent resident, could only return by filing a new I-130 petition); Ex. H, ¶ 12 (counsel was told by the Immigration Visa Unit at the U.S. Embassy in Bogota, Colombia that it could not issue a transportation boarding letter in the absence of instructions from DHS); Ex. G, ¶¶ 6-8 (ICE told attorney that client could only return by applying for a visa at the U.S. Embassy in Lagos, but Embassy refused to issue visa on grounds that the client had been ordered removed, refusing to recognize the effect of a Third Circuit decision vacating that order)).

B. Information supporting a motion for stay of removal

Attorneys seeking stays of removal while review of a removal order is pending may wish to cite the following barriers to return after winning a case from outside the U.S.

- 1. Lengthy delays.** The lack of any official procedure for return means that negotiating reentry after a successful petition for review is generally a lengthy process, often plagued by unforeseen delays. (Complaint Ex. G, ¶¶ 5-14 (attorney spent five months negotiating return); Ex. K, ¶¶ 12-18 (attorney spent 3 months arranging return); Ex. L, ¶ 11 (same); Ex. C (individual who could not afford attorney made repeated attempts over a period of over seven years to obtain assistance from the U.S. Embassy in Port-Au-Prince but was only able to return after a U.S. journalist reported his story and he obtained pro bono representation); Ex. G, ¶¶ 24-32 (pro se individual spent nearly four years in the Philippines after prevailing on his petition for review and was only able to return after he filed a motion with the Third Circuit and the court appointed counsel); Ex. I, ¶ 8 (after case was remanded from the Fifth Circuit and a hearing was scheduled, ICE indicated return would take at least six months and sought to administratively close proceedings in the interim); Ex. I, ¶ 13-14 (immigration court proceedings were twice continued so that ICE could have time to investigate how return could be arranged, resulting in a two-month delay to date). Delay is often exacerbated by logistical difficulties that arise even after the government has agreed to return. (Complaint Ex. K, ¶¶ 15-16 (individual was denied boarding by airline, missed hearing date, and had to pay rebooking fee because ICE issued invalid travel document); Ex. G, ¶¶ 12-13 (although ICE agreed to facilitate issuance of a boarding letter, return was delayed by over a month because the Department of State refused to issue a boarding letter and/or because no one involved in the matter could identify the proper personnel at the consulate to issue the letter); Ex. G, ¶¶ 30-32 (ICE agreed to facilitate boarding letter but State Department personnel refused to arrange interview and initially refused to accept agreement negotiated between attorney and ICE, resulting in the purchase and cancellation of several flights before individual could return); Ex. G, ¶¶ 37-39 (despite the complete cooperation of DOJ and ICE, State Department personnel delayed return by several months); Ex. L, ¶¶ 9-10 (successful Supreme Court petitioner was denied admission and publicly humiliated by CBP at border despite agreement with ICE that he would present himself at a specific date and time and would be paroled in)).
- 2. Costs.** In most cases, the government refuses to pay the cost of transportation back to the United States on the grounds that the removal was lawful at the time it occurred (i.e. the person was removed pursuant to a final order of removal and not in violation of a stay). (Complaint Ex. AA (internal DHS email regarding individual who won PFR at 9th Circuit states: “The alien is responsible for paying his own transportation once the parole has been authorized.”); Ex. EE (internal DHS email regarding individual who prevailed before an Immigration Judge from outside the U.S. states: “Since the alien’s removal was proper, I would suggest that DHS would not be responsible for paying for the alien’s return, but we should facilitate the alien’s return by assuring that the necessary parole paperwork is processed.”); Ex. K, ¶¶ 15-16 (DHS initially agreed to pay reasonable travel expenses for individual who prevailed on PFR but then reversed its position on grounds

that individual's removal was not erroneous; DHS later refused to pay rebooking fee when individual was denied boarding at the airport because DHS had issued incorrect travel document); Ex. F, ¶ 8 (ICE refused to pay for transportation); Ex. L, ¶ 7 (same); Ex. G, ¶¶ 12, 30 (same)). In addition, the process of return is nearly impossible to navigate without an attorney, and attorneys frequently spend many months negotiating return, so individuals without pro bono representation may incur attorney's fees. (Complaint Ex. C (individual was removed to Haiti while his appeal was pending and could no longer afford an attorney; although the Third Circuit overturned his removal order, officials at the U.S. Embassy in Haiti refused to facilitate his reentry and told him he would need to get a lawyer in order to return); Ex. G, ¶¶ 24-30 (pro se individual was unable to return until counsel was appointed and was able to negotiate return with ICE); Ex. G, ¶¶ 5-14 (attorney spent five months negotiating return); Ex. K, ¶¶ 12-18 (attorney spent 3 months arranging return)).

3. **Detention.** If the individual was detained prior to removal, he or she will usually be detained upon return. (Complaint Ex. I, ¶ 6; Ex. E ¶ 5; Ex. C, ¶ 30; Ex. D, ¶ 10-11; Ex. F, ¶ 7 (attorney arranged prior to arrival for client to be released on \$10,000 bond)). In addition, the government may insist on detaining returnees even after they have been granted relief pending the completion of security checks. (Complaint Ex. K, ¶¶ 17-22 (individual with no criminal record was kept in detention for nearly four weeks after relief was granted on grounds that DHS needed to complete a background check, despite fact that attorney had repeatedly asked DHS in the preceding months to conduct the background check prior to return so client would not need to face detention for longer than necessary)).
4. **Reinstatement of prior immigration status.** Although the government told the Supreme Court in *Nken* that it accords returnees the status they held prior to removal,³ in practice many individuals are returned through parole, which subjects an individual to treatment as an "arriving alien" and grounds of inadmissibility. (Complaint Ex. CC (Internal DHS email discussing problems with parole and status upon return: "The only way to get him back is with 'advanced parole'. However, that would make him an arriving alien, which would not be restoring him to the status quo that existed when he was improperly removed, since your alien was in proceedings as an EWI."); Ex. Z (Memo from ICE OPLA indicating that individual who was removed in violation of a stay will be issued a new I-261 containing "additional allegations and charges of inadmissibility" upon being paroled back into the U.S.); Ex. G, ¶ 28 (government opposed motion to order return on grounds that individual was inadmissible); Ex. G, ¶ 14 (despite pre-return agreement that individual would not be treated as an "arriving alien" and would instead be accorded pre-removal status, ICE attorney took position upon return that individual could be treated as "arriving alien"); Ex. E, ¶ 9 (ICE refused to issue temporary lawful permanent resident card and insisted that individual, a lawful permanent resident, return by parole, subjecting him to treatment as an "arriving alien"))).

³ Brief for Respondent at 44, *Nken v. Holder*, 129 S.Ct. 1749 (2009) (08-681).

- 5. Inability to appear for hearings on remand.** In some cases, DHS takes the position that an individual who has been removed and prevails in a petition for review may not return and instead must participate in any remanded proceedings by videoconference. (Complaint Ex. B, ¶ XVIII (DHS refused to allow asylum applicant who prevailed in petition for review to reenter the country to participate in remanded asylum hearing, so individual will participate by videoconference from U.S. consulate abroad)). *See also* Complaint Ex. J, ¶ 15 (DHS was planning for individual to participate in remanded hearings by video conference from Haiti until infrastructure was destroyed by earthquake); Ex. G, ¶ 8 (ICE suggested that individual request a telephonic appearance at upcoming hearing after U.S. Embassy denied visa).

C. Information to support an argument that courts should affirmatively order return

- 1. Agencies do not arrange return as a matter of policy or practice.** As discussed in Part A, the agencies have no formal policy for arranging return and frequently refuse to facilitate reentry. Thus, in the absence of a court order, there is no guarantee that an individual who successfully challenges his or her removal order will be able to return. In addition to the sources cited in Part A, *see also* Complaint Ex. B, ¶¶ XV-XVII (Eleventh Circuit denied mandamus seeking court order compelling government to facilitate return on grounds that petitioner had not exhausted administrative remedies; ICE has refused to allow return and petitioner must appear at asylum hearing by videoconference); Ex. J, ¶¶ 2-3 (Third Circuit denied motion for court order requiring government to return successful petitioner after government told court that the return process was “already underway;” government failed to return petitioner for nearly eight years, until after he obtained new counsel).
- 2. Filing a motion with the circuit court has often proven necessary to compel the government to facilitate return.** *See* Complaint Ex. L, ¶¶ 4-11 (ICE and OIL agreed to facilitate return only after attorney filed motion to amend the judgment); Ex. G, ¶¶ 16, 27-30 (in two cases, ICE only agreed to cooperate in arranging return after motions were filed with the circuit court that had granted the petitions for review).

D. Information to assist attorneys seeking to arrange return

The following information from the complaint may be helpful in determining how to arrange a client’s return.

- 1. Most attorneys have to work with multiple agencies to arrange return; expect for your requests to be denied and be persistent.** As discussed above, there is no official procedure or method for arranging return and the agencies frequently refuse assistance initially. Attorneys seeking to arrange return may find helpful the following declarations detailing the procedure by which other attorneys have arranged their clients’ return: Exhibits E, F, G, H, I, J, K, L.

2. **Some attorneys have found it necessary to file a motion in court before the government would cooperate in arranging return.** *See* Complaint Ex. L, ¶¶ 4-11 (ICE and OIL agreed to facilitate return only after attorney filed motion to amend the judgment); Ex. G, ¶¶ 16, 27-30 (in two cases, ICE only agreed to cooperate in arranging return after motions were filed with the circuit court that had granted the petitions for review). *C.f.* Ex. B, ¶¶ XV-XVII (Eleventh Circuit denied mandamus seeking court order compelling government to facilitate return on grounds that petitioner had not exhausted administrative remedies; ICE has refused to allow return and petitioner must appear at asylum hearing by videoconference).

3. **In some cases, the government has paid for the cost of transportation back to the U.S. and has agreed prior to return that the individual will be reinstated to his or her pre-removal status.** You may be able to use the following examples to press the government to do the same for your client: Complaint Ex. E, ¶ 10 (ICE agreed to arrange and pay for flight to ensure that individual arrives in advance of his master calendar hearing); Ex. I, ¶¶ 8, 12 (ICE agreed to bring client back at government expense); Ex. G, ¶¶ 14, 30 (attorney negotiated with ICE that clients would be accorded their pre-removal status upon return, as if they had never been deported).