

Reproduced with permission from The United States Law Week, 84 U.S.L.W. 538, 10/27/15. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Immigration—Removal

INA's 'Residual Clause' Unconstitutional; May Open 'Can of Worms' in Criminal Law

The U.S. Court of Appeals for the Ninth Circuit struck down a part of the Immigration and Nationality Act as unconstitutionally vague, with potentially broad ramifications for other federal criminal statutes (*Dimaya v. Lynch*, 2015 BL 342746, 9th Cir., No. 11-71307, 10/19/15).

The Oct. 19 decision relied heavily on the U.S. Supreme Court's decision last term in *Johnson v. United States*, 83 U.S.L.W. 4576, 2015 BL 204915 (U.S. June 26, 2015) (83 U.S.L.W. 2001, 6/30/15), which invalidated similar language in the Armed Career Criminal Act.

The “undeniable identity of the constitutional defects in the two statutory provisions” doomed the provision in the INA, Judge Stephen Reinhardt wrote for the court.

The National Immigration Project of the National Lawyers Guild, which participated as an amicus in the case, said in a statement that the ruling “will help thousands of immigrants.”

Sejal Zota, a NIPNLG attorney who argued before the Ninth Circuit in the case, called the decision “a victory for due process and fair notice” in an Oct. 23 e-mail.

Andrew M. Knapp, who represented James Garcia Dimaya, told Bloomberg BNA in an Oct. 21 e-mail that the decision “will help untold, long term noncitizen residents of the United States with felony convictions” to “remain in this country with their families and escape the vicious cycle of deportation and unlawful reentry prosecutions, carrying excessively enhanced prison sentences.”

Broad Impact on Criminal Prosecutions. The case could have ramifications that extend well beyond the immigration context.

Paresh Patel, an appellate attorney at the Maryland federal public defender's office, told Bloomberg BNA in an Oct. 23 call that the decision here could affect criminal prosecutions as well.

He noted particularly that 18 U.S.C. § 924, which is commonly charged and enhances penalties for use of a firearm in the commission of a crime, contains the same residual definition for “crime of violence” as the Ninth Circuit invalidated here.

Prosecutions under the federal three-strikes law, 18 U.S.C. § 3559, and pre-sentencing detention under the Bail Reform Act, 18 U.S.C. § 3142, may be affected as well, he said.

Petition Expected. Patel predicted a petition for review by the government, saying that the decision opened a “can of worms.”

However, he also believed that Dimaya would win that appeal—before either the Ninth Circuit again or the Supreme Court—because “logically speaking,” after *Johnson*, “there's no way the residual clause can remain.”

Zota agreed, predicting that the Supreme Court would agree with *Dimaya* when the issue reached it. She also said that NIPNLG and similar organizations were pursuing similar challenges in other circuits, although to her knowledge none have been argued yet.

However, “I do expect *Dimaya* to be influential with other courts as it is a robust, well-reasoned opinion,” she said.

Residual Clause. The INA makes an immigrant who commits one of several enumerated offenses or “any other offense that is a felony and that, by its nature, involves a substantial risk of physical force” ineligible for relief from removal.

This “residual clause” closely parallels the residual clause in the ACCA, which defined a violent felony as one that “involves conduct that presents a serious potential risk of physical injury to another.”

The Supreme Court found this language unconstitutionally vague in *Johnson*.

According to the Ninth Circuit, the clauses were “subject to the same mode of analysis.”

To determine whether either residual clause applied, courts didn't examine the conduct actually committed by the defendant, but had to decide what the “usual or ordinary” violation of the statute entailed, and then determine how great a risk that ordinary conduct posed, it said.

Twin Uncertainties. This mode of analysis has two features that combined to make the statutes unconstitutionally vague in both cases, the court said.

First, it left “grave uncertainty” about what the “ordinary instance” of a particular crime is, with no reliable way to choose between competing versions.

Second, it left “uncertainty in determining the degree of risk,” the court said.

Though there were “minor distinctions” in the language of the two statutes, none undermined *Johnson*'s applicability.

Judge Kim McLane Wardlaw joined the opinion.

Dissent: Court Ventured Too Far. Judge Consuelo M. Callahan dissented. She argued that the crime here—burglary—is “the classic example” of a crime presenting a substantial risk of force in the ordinary case, and

that neither the “Supreme Court nor the Ninth Circuit has had any trouble in applying this standard.”

Invoking Star Trek, she wrote, “I fear that we have again ventured where no court has gone before and that the Supreme Court will have to intervene to return us to our proper orbit.”

The Department of Justice declined to comment for this story.

Andrew M. Knapp of Southwestern Law School, Los Angeles, represented Dimaya. The Department of Justice represented the government.

BY NICHOLAS DATLOWE

Full text at http://www.bloomberglaw.com/public/document/Dimaya_v_Lynch_No_1171307_2015_BL_342746_9th_Cir_Oct_19_2015_Cour.