

# Vanderbilt Journal of Transnational Law

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Volume 23  
Issue 4 *Issue 4 - 1990*

Article 6

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1990

## Case Digest

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### Recommended Citation

Law Review Staff, Case Digest, 23 *Vanderbilt Law Review* 881 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss4/6>

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# CASE DIGEST

This Case Digest provides brief analyses of cases that address current transnational legal issues. The Digest includes cases that set forth new legal principles and cases that apply established legal principles to new factual situations. The cases have topical headings and references are given for further research.

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### I. ALIENS AND ASYLUM

EL SALVADORAN SOLDIER WHO REFUSED TO PARTICIPATE IN ASSASSINATION SCHEME GRANTED POLITICAL ASYLUM IN THE UNITED STATES BECAUSE HE DEMONSTRATED "WELL-FOUNDED FEAR" OF PERSECUTION IN EL SALVADOR, *Barraza Rivera v. Immigration & Naturalization Service*, 913 F.2d 1443 (9th Cir. 1990).

In December 1983, Barraza was recruited forcibly for military service in El Salvador. He received approximately twenty days of training with weapons and subsequently participated in military operations, but not directly in battle. In January 1984, an officer told Barraza that he would have to participate in a paid assassination. Barraza stated that the officer pulled him out of formation and indicated that he would be killed if he did not participate in the assassination. Because he was morally opposed to paid assassination and because he feared for his life, Barraza fled El Salvador for the United States. He was apprehended by the United States Immigration and Naturalization Service (INS) near Brownsville, Texas and was placed in deportation proceedings. Barraza applied for political asylum and for withholding of deportation. At an INS hearing, on his claims for asylum and withholding of deportation, an INS immi-

gration judge denied Barraza's requests. The Board of Immigration Appeals (BIA) dismissed Barraza's appeal, and Barraza appealed to the United States Court of Appeals for the Ninth Circuit. *Held: Reversed and remanded.*

The court ruled that punishment for objecting to participate in an inhuman act, such as the threatened assassination, as part of forced military service constituted "persecution" for purposes of determining eligibility for political asylum. Nevertheless, an alien also must demonstrate that there is a clear probability of persecution in his or her case for deportation to be withheld.

After addressing discovery and evidentiary issues, the court explained that adjudications of political asylum claims require a two-step analysis. First, an alien must qualify as a "refugee" to be eligible for asylum. Second, if the alien establishes refugee status, the Attorney General has the discretion to grant asylum. A refugee is one who is unable or unwilling to return to his home country because of "persecution or a 'well-founded fear' of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Barraza Rivera*, 913 F.2d at 1449 (quoting 8 U.S.C. § 110(a)(42)(A)). The court emphasized that the well-founded fear standard has both subjective and objective components. A showing of genuine fear by the claimant will satisfy the subjective component, and a showing of facts that support a reasonable fear of persecution will satisfy the objective component.

In addition to meeting the criteria necessary to qualify for asylum, an applicant must show that he or she is eligible to have their deportation withheld. To be entitled to "mandatory withholding deportation relief," an alien must show a "clear probability of persecution." *Id.* The court indicated that it was more difficult for an alien to meet the "clear probability" standard than the "well-founded fear" standard applicable to applications for asylum.

The court noted that requiring military service and punishing deserters, alone, does not constitute persecution. The court acknowledged, however, that the Ninth Circuit had recognized conscientious objection to military service as a legitimate ground for relief from deportation. (citing *Canas-Segovia v. INS*, 902 F.2d 717, 726 (9th Cir. 1990)). The court also noted that, in *Canas-Segovia*, the Ninth Circuit had defined "conscientious objector" broadly to include "one whose actions are governed by conscience" and had found that "persecution arises whenever that conscience is overcome by force or punishment meted out for the refusal to betray it." *Barraza Rivera*, 913 F.2d at 1451 (quoting *Canas-Segovia*, 905 F.2d at 726).

The court noted there was ample support for finding persecution in

cases of conscientious objection when military orders, issued after induction, violate standards of human decency. For support of this proposition, the court relied on the *Handbook on Procedures and Criteria for Determining Refugee Status* (the *Handbook*), issued by the Office of United Nations Commissioner for Refugees in 1979. According to the *Handbook*, punishment for desertion or draft evasion is not prosecution, but disproportionately severe punishment on account of one of several factors, including religion, does constitute persecution. In addition, the *Handbook* advises that an alien may qualify for refugee status after desertion or draft evasion if the alien can show that military service would require engaging in acts "contrary to basic rules of human conduct." *Id.* (quoting the *Handbook*).

The court noted that, although the Immigration and Nationality Act does not list persecution resulting from conscientious objection as grounds for asylum eligibility, the United States Supreme Court had defined the term "religion" broadly in conscientious objection cases. *Id.* at 1451 (quoting *Welsh v. United States*, 398 U.S. 333, 339-40 (1970) and *United States v. Seeger*, 380 U.S. 163, 176 (1965)). The *Barraza Rivera* court then noted that a "refusal to engage in inhuman acts of violence out of a sincere, strongly held belief that the acts are wrong . . . is tantamount to religious objection to participation in the acts." *Id.* at 1452 (citations omitted). The court found that, on the basis of this broad definition of religion, the BIA's ruling that refusal to participate in inhuman acts may be grounds for political asylum, the Ninth Circuit's broad definition of conscientious objection in the asylum context, and Barraza's testimony, Barraza had satisfied the subjective component of "well-founded fear."

As for the objective component of the well-founded fear standard, the court found that "Barraza established a genuine and objectively reasonable fear" that he would be killed upon his return to El Salvador for his refusal to participate in the assassination. *Id.* at 1454. Reversing the BIA, the court held that Barraza was eligible for political asylum.

The court, however, held that the BIA acted reasonably when it found that Barraza had "failed to show a 'clear probability' of persecution necessary to obtain withholding of deportation . . ." *Id.* Barraza had not shown that it was probable that he either "would be forced to participate in the unconscionable assassinations or would be killed for refusing to do so." *Id.* The court, therefore, remanded the case to the BIA for credibility findings on Barraza's testimony. If his testimony was found to be credible, BIA was ordered to exercise its discretion on withholding deportation. *Id.* *Significance*—The Ninth Circuit found that an alien conscientious objector is eligible for asylum when the alien had faced perse-

cution in his homeland for refusing to participate in inhuman acts.

## II. ADMINISTRATIVE LAW/IMMIGRATION

THIRD CIRCUIT HOLDS THAT THE EQUAL ACCESS TO JUSTICE ACT DOES NOT APPLY IN DEPORTATION PROCEEDINGS BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE—REFUSAL TO FOLLOW THE NINTH CIRCUIT, *Clarke v. INS*, 904 F.2d 172 (3d Cir. 1990).

The Immigration and Naturalization Service (INS) sought to deport Earle Clarke under 8 U.S.C. § 1251(a)(11) as an alien who had been convicted of possession of a controlled substance. An immigration judge dismissed all deportation proceedings on the grounds that proof of the conviction was not supported by sufficient evidence. Clarke then sought attorneys' fees and costs under the Equal Access to Justice Act (EAJA), but was denied relief. The immigration judge held that the EAJA did not apply to deportation proceedings. On appeal, the United States Court of Appeals for the Third Circuit *Held: Affirmed*. The court rejected the holding of the United States Court of Appeals for the Ninth Circuit in *Escobar Ruiz v. INS*, 838 F.2d 1020 (1988) (*en banc*), that the EAJA applied to deportation proceedings.

The court explained that the EAJA allows parties in administrative "adversary adjudications" to recover attorneys' fees and costs from the government. The court added that the EAJA defines adversary adjudications as adjudications under section 554 of the Administrative Procedure Act (APA). According to the court, the dispositive issue in Clarke's case was "whether deportation proceedings are adversary adjudications 'under section 554' of the APA and are thus covered by the EAJA." *Clarke*, 904 F.2d at 174.

The INS argued that the term "under section 554" should be interpreted as "governed by" or "conducted under" section 554. *Id.* The court noted that under this interpretation, the EAJA would not apply to immigration cases because the Immigration and Nationality Act of 1952 (INA) was designed to be "the sole and exclusive procedure for determining deportability of an alien . . ." *Id.* (quoting section 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1252(b)). The court also noted that the United States Supreme Court had interpreted section 242(b) of the INA "to mean that the APA's hearing procedures do not apply to deportation proceedings before INS hearing officers." *Id.* (citing *Marcello v. Bonds*, 349 U.S. 302, 310 (1955)). The Third Circuit had followed *Marcello* and held that hearings before the Board of Immigration Appeals (BIA) were exempt from APA requirements.

Clarke argued that deportation proceedings, even if not governed by

the APA, must still be consistent with section 554's substantive requirements. In support, Clarke cited *Escobar Ruiz v. INS*, which emphasized the difficulties encountered by unrepresented aliens in deportation hearings. The *Escobar Ruiz* court noted that the phrase "an adjudication under section 554," was ambiguous and could mean either "governed by" the APA or "as defined by" the APA, and it held that the latter reading was supported by the EAJA's legislative history and remedial purposes. *Id.* at 175 (citing *Escobar Ruiz*, 838 F.2d at 1023-26).

In response to Clarke's argument, the Third Circuit noted that the Supreme Court has held that statutes eliminating the government's immunity from claims for attorneys' fees "must be 'construed strictly in favor of the sovereign' and not '(e)nlarged . . . beyond what the language requires.'" *Id.* (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983)). The court then noted that the *Escobar Ruiz* interpretation of "under section 554" was "strained and untenable." *Id.* at 175. The court also found that *Escobar Ruiz* had been "justifiably criticized . . . for its expansive statutory interpretation." *Id.* (citing *St. Louis Fuel Supply Co. Inc. v. FERC*, 890 F.2d 446 (D.C. Cir. 1989) and *Owens v. Brock*, 860 F.2d 1363 (6th Cir. 1988)).

The *Escobar Ruiz* court had found that Congress favored a broad interpretation of the phrase "under section 554" because the EAJA applied to disability determinations under the Social Security Act. The Third Circuit rejected Clarke's argument that, because social security disability proceedings are governed by the EAJA, deportation proceedings also should fall within the coverage of the EAJA. The court noted first that the legislative history indicated that Congress "believed social security hearings to be covered by section 554," but because the United States typically was not represented by counsel, the social security hearings were not "adversary adjudications." *Clarke*, 904 F.2d at 177. Second, the court noted that, in the course of "amending and extending the EAJA in 1985, Congress remained silent about EAJA's application to deportation proceedings despite the Attorney General's clear 1984 regulation which excluded deportation proceedings from EAJA's reach." *Id.* (citing 28 C.F.R. § 24.103). Third, the court noted that the legislative history of EAJA did not explain or qualify section 292 of the INA, which provides that "an alien in deportation proceedings 'shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.'" *Clarke*, 904 F.2d at 177 (emphasis by the court) (quoting 8 U.S.C. § 1362).

The court also cited two instances in which Congress overturned judicial decisions and expanded the "definition of 'adversary adjudication' to

include proceedings that had previously been considered outside EAJA's scope." *Id.* at 177. Because these amendments showed Congress's inclination to actively expand the scope of the definition of "adversary adjudications," the Third Circuit, in the absence of positive Congressional action, was reluctant to infer that Congress intended "to include deportation proceedings within the EAJA." *Id.* at 178. Finally, the court found desirable a bright line rule that attorneys' fees were available only in adversary adjudications that Congress subjected to section 554. *Id.*

The court acknowledged that Clarke's interpretation would serve the EAJA purpose of ensuring that persons will not be deterred from asserting their rights against unjustified governmental action because of the expense involved. The court concluded, however, that the basic canons of statutory interpretation mandated a holding that the EAJA did not apply to, and therefore attorneys' fees were unavailable in, deportation procedures before the INS. *Significance*—The Third Circuit rejects the Ninth Circuit's holding that the Equal Access to Justice Act applies to deportation proceedings.

### III. ACT OF STATE DOCTRINE/JURISDICTION

IRANIAN CORPORATION ATTEMPTED TO COLLECT DEBT FOR PAYMENT OF SERVICES RENDERED IN IRAN TO UNITED STATES COMPANY PRIOR TO IRANIAN REVOLUTION UNDER THE EXTRATERRITORIALITY EXCEPTION TO THE ACT OF STATE DOCTRINE—EXCEPTION HELD INAPPLICABLE—*F. & H.R. Farman-Farmaian Consulting Engineers Firm v. Harza Engineering Company*, 882 F.2d 281 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 3301 (1990).

Harza Corporation (Harza) served as the prime contractor on a number of major water development projects in pre-revolutionary Iran. It engaged Farman-Farmaian Consulting Engineers Firm (the Consulting Firm) to perform services in connection with these projects. All of the services were performed in Iran, and the invoices were mailed to Harza's headquarters in Chicago. Harza had no office in Iran, and the Consulting Firm had no offices in the United States. After the Iranian revolution, the Consulting Firm was nationalized by the Iranian government, and Harza stopped doing business in Iran when the government refused to pay for services rendered to the Iranian government before the revolution. Harza later obtained an award for services rendered to the Iranian government before the Revolution from the Iran-United States Claims Tribunal (the Tribunal). The Iranian government dissolved the Consulting Firm without paying compensation to its owners. Prior to dissolution, the Consulting Firm was owned by Mr. Farman-Farmaian, as

managing director, and several members of his family. By the time of the dissolution, the members of the Farman-Farmaian family had left Iran.

Mr. Farman-Farmaian, on behalf of himself as well as all the other owners, and the Consulting Firm (the plaintiffs) filed suit in the United States District Court for the Northern District of Illinois. The plaintiffs claimed that two million dollars of Harza's award from the Tribunal belonged to the plaintiffs under the Consulting Firm's contract with Harza. The district court dismissed the suit on the grounds that the act of state doctrine, which forbids a United States court to question acts by a foreign state that conform with that state's laws, barred the suit. The United States Court of Appeals for the Seventh Circuit *Held: Affirmed.*

The court first examined the issue of jurisdiction. The court noted that complete diversity must exist between the parties in alienage cases, as in ordinary diversity cases. Mr. Farman-Farmaian and the Consulting Firm were both citizens of Iran, and Harza was, for jurisdiction purposes, a citizen of both Delaware and Illinois. The court noted, however, that one shareholder of the Consulting Firm, represented through a power of attorney by Mr. Farman-Farmaian, was a citizen of Illinois at the time the suit was filed. It was possible that this member of the Farman-Farmaian family could destroy complete diversity. The court stated that, first, it would confine its inquiry on citizenship to the named parties. Then, assuming complete diversity of the named parties, the court would continue if the named parties were the real parties in interest and all indispensable parties had been included.

After discussing Mr. Farman-Farmaian's relation with his family members for purposes of the lawsuit, the court stated that it could drop Mr. Farman-Farmaian, and the family members be represented, as a party at the appeal stage to maintain jurisdiction. The effect of dropping Mr. Farman-Farmaian would be a suit between an Iranian firm, the Consulting Firm, and an Illinois corporation, Harza. On the jurisdiction issue, the court found the citizenship of the owners represented by Mr. Farman-Farmaian to be immaterial, but if incorrect, the court "would drop him as plaintiff to preserve jurisdiction and there would be no effects on the merits." *Id.*

The court noted that Harza owed its debt to the firm and not to the owners. For the owners to recover the debt, they would have to show "that the court should disregard the [Iranian] seizure in adjudicating the Consulting Firm's claim against Harza." *Id.* If the court disregarded the seizure, Mr. Farman-Farmaian, as managing director of the pre-seizure firm, and not the Iranian liquidators, would recover the judgment against Harza. The court found that corporations expropriated abroad continue to exist and can sue within the United States if "the court can



disregard the expropriation without violating the act of state doctrine." *Id.* To avoid violation of the act of state doctrine, the plaintiffs would have to rely on the extraterritoriality exception.

The court found that the plaintiffs' reliance on the extraterritoriality exception to the act of state doctrine would require that the act of confiscation by the Iranian government was not complete within the confiscatory state. The issue confronting the court, therefore, focused on the location of Harza's debt to Farman-Farmaian. The court concluded that a debt has no physical location, but the Consulting Firm did not have an asset in the United States merely because it had a claim against a United States company. The court held that the extraterritoriality exception failed because the confiscation was complete within Iran and all the Consulting Firm's assets and operations were in Iran. Thus, a United States court cannot "undo the confiscation." *Id.* at 286.

The court explained that a contrary holding would "greatly reduce the scope of the act of state doctrine . . ." *Id.* The court found Harza's concern that the Iranian liquidators also could claim the same two million dollars was valid because the court would then have "to determine the legality under Iranian law of the seizure of an Iranian company in and by Iran." *Id.*

The court noted that it is the purpose of the act of state doctrine to minimize the courts' interference with United States foreign policy. At issue in this case was the "propriety of dealings between the Iranian government and an Iranian corporation." *Id.* at 287. The court concluded that "the United States has an independent concern with protecting property and transactions . . . within its borders." *Id.* It is this independent interest in property and transactions within the United States that gives rise to the extraterritorial exception, but there was no such interest in this case. Thus, the court could not disregard a locally valid act of the Iranian state against an Iranian firm, the operations and assets of which were confined to Iran. *Significance*—The Seventh Circuit refused to extend the extraterritorial exception to the act of state doctrine to debts owed by a United States company to a firm that had all operations and assets in a foreign country and that had been seized by that government.