Plenary Power under Review

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Over 100 years ago, in the *Chinese Exclusion Case*, the SCOTUS set in motion a long line of cases that established the doctrine of consular non-reviewability. Under this doctrine, decisions regarding the admission of foreign nationals to the U.S. rest exclusively within the powers of the Legislative and Executive branches, with the Judicial branch lacking any authority to review such determinations.

As a result, consular officers' decisions to grant or deny a visa have been subject to little or no judicial review. In a recent decision, one federal district court noted "a court does not have jurisdiction to review a consular official's decision, even if its foundation was erroneous, arbitrary or contrary to agency regulations." However, in February 2015, after the Justices' winter break, the first case they heard was on the subject of consular non-reviewability and plenary power.

In *Kerry v. Din*, the Court examined the current status of the doctrine of consular non-reviewability and will decide whether a naturalized U.S. citizen married to a foreign national and affected by the Department of State's (DOS) decision to deny a visa to her husband has the right to know the factual basis for the denial.

It is not unusual for the DOS, after USCIS has approved a petition, to deny an immigrant visa to the spouse or parent of an U.S. Citizen or to a talented foreign worker sponsored by a U.S. employer and cite a vague statutory provision or to give no reason for the denial.

For years, the DOS has claimed complete discretion over its decisions to deny visas. This power has led to permanent family separation, employers the inability to acquire foreign talent, and our courts generally deny review of these decisions. However, in 1972, the SCOTUS in *Kleindienst v. Mandel* provided a narrow exception to the doctrine and the opportunity for judicial review when the denial affects the rights of U.S. citizens and the government does not have "facially legitimate and bona fide reason" for denying the visa.

In the case at issue, Mrs. Din, the aggrieved U.S. citizen wife, sought Court review of the DOS' denial of an immigrant visa to her husband. Mrs. Din filed an immigrant "green card" petition for her Afghan husband, Mr. Berashk. USCIS approved the petition, and in 2009 Mr. Berashk was interviewed at the consulate in Islamabad, Pakistan for his immigrant visa. During the interview, he answered that he had worked as a clerk for the Afghan Ministry of Social Welfare and the

Afghan Ministry of Education under the Taliban regime. After the interview, he was advised that his immigrant visa was approved and he should receive his visa shortly.

Almost a year after the interview and after many inquiries, Mr. Berashk was informed that his visa had been denied under INA sec. 212(a) and he was ineligible for a waiver. After additional inquiries, he was informed that his visa was denied more specifically under INA sec. 212(a)(3)(B), which renders a person inadmissible under terrorism related grounds. DOS refused to offer any additional or factual evidence to justify the denial.

Mrs. Din sued the DOS in Federal Court but the District Court dismissed the complaint citing the doctrine of consular non-reviewability. She appealed and the Ninth Circuit ruled that the limited *Mandel* review was applicable and ordered the DOS to provide a "facially legitimate and bona fide" reason for the denial of the visa. The government appealed to the SCOTUS and the Court heard oral argument on February 23rd.

The government argued that Mrs. Din lacked a constitutionally protected interest in her husband's visa denial; that the government has the undisputed power to exclude foreign nationals from the U.S.; and that there is no judicial review of the consular officers' decision.

During oral argument, Justices Sotomayor, Kagan, Breyer and Ginsburg expressed concern about consular officers' potentially erroneous or discriminatory visa denials with no opportunity for judicial review. Justice Sotomayor described the administrative process after a spousal visa denial as an "administrative nightmare."

The attorney for Mrs. Din, urged the Court to affirm the Ninth Circuit's decision and require the DOS to provide an explanation for the visa denial. The Justices questioned him as to the scope of Mrs. Din's constitutional rights and the possibility of increased litigation and appeals if the Court were to allow a more liberal review of consular officers' decisions.

The SCOTUS decision is expected in June 2015. The decision will affect not only Mrs. Din and her husband, but also the lives and hopes of many U.S. citizens who petition for their families and the right and interests of U.S. employers. The decision will largely depend on how the Justices apply the limited *Mandel* review to this case. We hope the Court's decision will preserve the current *Mandel* review and expand the right to know for U.S. citizens' spouses and employers affected by the DOS' visa denials.

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