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CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

***Avena* Implementation and Related Issues**

On August 21, 2017, a state court in Nevada issued its decision that the lack of consular assistance to a Mexican national, Carlos Gutierrez, a habeas petitioner who was charged with and sentenced on capital murder charges, prejudiced Gutierrez such that the death penalty in his case must be vacated. *Gutierrez v. State of Nevada*, No. CR94-1795B (2d. Dist. Nev. Washoe, 2017). The court found that evidence of Gutierrez's mental health problems, childhood exposure to toxins, and cognitive impairments was not presented as possible mitigating information at sentencing and would have been discovered had the Mexican consul been notified of the case, as required under the Vienna Convention on Consular Relations. The court's opinion is available at <https://www.state.gov/s/l/c8183.htm>.

B. CHILDREN

1. Adoption

a. Report on Intercountry Adoption

In April 2017, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2016 Annual Report, as well as past annual reports, can be found at <https://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html>. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2016, average times to complete adoptions, and median fees charged by adoption service providers.

b. U.S. Adoption Service Providers

On July 28, 2017, the Department of State entered into a Memorandum of Agreement with Intercountry Adoption Accreditation and Maintenance Entity, Inc. ("IAAME"), designating IAAME as an accrediting entity for five years, for the purpose of accreditation of agencies and approval of persons to provide adoption services in intercountry adoptions pursuant to the Hague Convention, the Intercountry Adoption Act ("IAA"), and the Intercountry Adoption Universal Accreditation Act ("UAA"). 82 Fed. Reg. 40,614 (Aug. 25, 2017). The text of the Memorandum of Agreement is available as part of the notice in the Federal Register. *Id.*

On October 6, 2017, the Council on Accreditation ("COA") informed the State Department that it would not be able to continue as an accrediting entity. See State Department adoption notice, available at <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/adoption-notice-coa-statement-of-october-6-2017-14oct2017.html>. COA's Memorandum of Agreement ("MOA") with the Department provides that the parties will consult on a solution that will enable COA to continue to perform its duties until the end of the Agreement period, if possible. If no solution can be reached, the agreement may be terminated on a mutually agreed date or not less than 14 months from the date the Department received written notice from COA. The adoption notice elaborates on the status of COA:

In accordance with the IAA, the Department conducts an annual performance review of each AE to ensure it is in compliance with the IAA, the UAA, and implementing regulations. Prior annual performance reviews made recommendations about COA's implementation of certain policies and procedures in support of accreditation and approval decisions, as well as the ongoing monitoring and oversight of adoption service providers, including their supervision of foreign providers. The discovery, during the debarment process of an adoption service provider in 2016, of issues that had existed prior to the provider's most recent re-accreditation but did not prevent its re-accreditation, raised additional concerns with COA's performance. As a result of these and other concerns, the Department undertook a more extensive annual review of COA's operations in the spring of 2017.

On August 8, 2017, the Department provided its annual performance review to COA in which it identified numerous concerns and deficiencies in the implementation of many of its policies and procedures. The Department required COA to undertake specific corrective measures to address these concerns and deficiencies. For example, the Department instructed COA to act within 30 days to ensure adoption service providers comply with regulations regarding foreign-supervised providers.

As discussed in *Digest 2016* at 48, the State Department temporarily debarred European Adoption Consultants, Inc. ("EAC") for a period of three years in December 2016. EAC was given an opportunity to dispute the Department's temporary debarment

action at a hearing held October 23-26, 2017. On December 13, 2017, Assistant Secretary of State for Consular Affairs Carl Risch upheld the Department’s temporary debarment of EAC. See State Department notice, available at <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/European-Adoption-Consultants-Temporary-Debarment-Upheld.html>.

c. *Litigation*

As discussed in *Digest 2016* at 48-54, the United States filed a motion to dismiss a federal complaint challenging the U.S. Government’s suspension (since 2010) of adoptions based on abandonment in Nepal. Consular officers in Nepal were unable to reliably verify reports of abandonment in the country. On March 31, 2017, the U.S. District Court for the District of Columbia Circuit issued its decision granting the motion to dismiss. *Skalka et al. v. Johnson et al.*, No. 16-107 (D.D.C.). The court rejected the plaintiffs’ argument that the regulatory requirement to “investigate” each orphan petition requires the government to conduct an investigation within any particular time, and thus prohibits the government from indefinitely suspending processing of adoptions. The court agreed with the United States Government that if information it needs to evaluate orphan petitions is unavailable or unreliable, it may be appropriate to suspend processing until such time as the information becomes reliable (however long that may take), rather than being compelled to evaluate individual cases on the basis of insufficient evidence. Excerpts follow (with footnotes omitted) from the court’s opinion.

* * * *

None of these standards for assessing agency inaction, nor any of the cases applying them, are a particularly good fit for a case like this one where the agency has decided, for a considered policy reason, to suspend processing what it admits are required adjudications on visa petitions. Indeed, the agencies promise to process the petitions as soon as doing so would be reliable and efficient. This is the very type of prioritizing and balancing of resources our Circuit Court acknowledged agencies are uniquely situated to calculate. In the end, however, the dispositive question is whether the suspension is both lawful and reasonable. Unfortunately for the plaintiffs, it is both!

Neither of plaintiffs’ textual citations—to the statute at 8 U.S.C. § 1154(b) and the regulation at 8 C.F.R. §204.3(k)—provide a sufficient legal basis for the Court to conclude that the agencies are unjustified in suspending the visa petitions here until such time as the information from the Nepalese government is sufficiently reliable to satisfy our agencies that the statutory requirements set by Congress are actually met. The use of “shall” in the statute relates to the Secretary’s duty when, *and if*, the requirements of the statute are met. And the regulatory requirement to conduct an abandonment investigation merely prohibits issuing an orphan visa *prior* to an investigation taking place. It does not require the agencies to undertake these investigations on a particular regularized basis. In other words, it does nothing to limit the

inherent discretion that the agencies have to manage the procedures for handling the large number of visa petitions they receive. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (decision not reviewable when it “involves a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise,” such as “the procedures it adopts for implementing [a] statute”). Moreover, the regulations themselves prescribe careful procedures for ensuring the accuracy of abandonment investigations. Put simply, it cannot be said that the existing regulations as a whole “require” the agencies to investigate an individual case to the point of complete satisfaction when the officers have genuine doubt about the reliability of their source. To say the least, evaluating the reliability of the foreign government’s information is critical to exercising their discretionary duty. As such, the agency action here has not been unlawfully withheld.

The final, related, question is whether the delay in question is unreasonable. ... I find that it is not. First, there is no deadline or timeframe prescribed by Congress for these investigations. To the contrary, Congress has given the agencies wide discretion in the area of immigration processing. *See Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015); *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997). Indeed, this is the very type of agency action, like the one in *In re Barr*, 930 F.2d 72, that if compelled would presumably delay other adjudications. The Court would be outside its limited role in these cases if it required the agencies to invest the high degree of resources that would be necessary to accurately investigate plaintiffs’ visa petitions, if possible, while others would suffer in response.

Next, I recognize that the nature of plaintiffs’ interests, and that of any orphans in Nepal who would be adopted, is of the most sensitive kind and most certainly involves “human health and welfare.” The agencies must therefore prioritize these cases consistent with the sense of urgency one would expect when familial interests at stake. ...Expediting the agencies’ delayed action in this situation would certainly have the effect of harming the “competing or higher priority” of accuracy. To say the least, accurately adjudicating whether a child has truly been abandoned by his or her parents is the first priority for the agency in this situation. Compelling agency action otherwise would insinuate the Court into the agencies’ judgment about whether they could accurately adjudicate these cases. That sort of judgment is at the very heart of the expertise that should be exercised by a U.S. Government official who is intimately familiar with the facts in Nepal and not a District Court judge who is ordering agency action in Washington, D.C. Small wonder that every other country in the world appears to have likewise suspended orphan adoptions in Nepal!

Finally, I can’t help but note that although it has been more than six years since the suspension went into effect, it has only been about two years since it was most recently reviewed by a U.S. delegation to Nepal. It has been even less time since the couples who are plaintiffs in this case submitted the petitions that should trigger investigation. ...In my review of the comparable cases, a delay of this length does not typically require judicial intervention. *Compare Debba v. Heinauer*, 366 F. App’x 696 (8th Cir. 2010) (10 years to adjudicate a permanent resident application not unreasonable); *In re City of Virginia Beach*, 42 F.3d 881 (4th Cir. 1994) (four and a half years not unreasonable in an adjudication affecting health and human welfare); *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988) (a five year delay might be close to the unreasonable threshold because delay was “unexplained”). Moreover, as long as the agencies are regularly revisiting the question whether they can rely on Nepalese sources to provide accurate information, then they are not delaying materially longer than necessary. The agencies have represented, and the Court has no reason to doubt, that when the situation in Nepal is improved

to the point of reliability, the couples' petitions will be reviewed with due haste. Accordingly, there is no plausible cause of action at this time under either the APA or the Mandamus Act because the agencies' action has not been unlawfully withheld or unreasonably delayed.

* * * *

2. Abduction

a. Annual Reports

As described in *Digest 2014* at 71, the International Child Abduction Prevention and Return Act ("ICAPRA"), signed into law on August 8, 2014, increased the State Department's annual Congressional reporting requirements pertaining to countries' efforts to resolve international parental child abduction cases. In accordance with ICAPRA, the Department submits an Annual Report on International Parental Child Abduction to Congress by April 30 of each year and a report to Congress on the actions taken toward those countries determined to have a pattern of noncompliance in the Annual Report by July 30 of each year. See International Parental Child Abduction page of the State Department Bureau of Consular Affairs, <https://travel.state.gov/content/childabduction/en/legal/compliance.html>.

The 2017 Report on International Parental Child Abduction (IPCA) is available at <https://travel.state.gov/content/dam/childabduction/complianceReports/2017%20ICAPRA%20Report%20-%20Final.pdf>. The 2017 report on actions taken is available at <https://travel.state.gov/content/dam/childabduction/complianceReports/2017%20IPCA%20Action%20Report%20-%20Final.pdf>. The 2017 action report summarizes actions the Department of State took in countries cited in the annual report for demonstrating a pattern of noncompliance: Argentina, the Bahamas, Brazil, Dominican Republic, Ecuador, Guatemala, India, Jordan, Nicaragua, Panama, Peru, Romania, and Tunisia. ICAPRA defines a pattern of noncompliance as the persistent failure: (1) of a Convention country to implement and abide by provisions of the Hague Abduction Convention; (2) of a non-Convention country to abide by bilateral procedures that have been established between the United States and such country; or (3) of a non-Convention country to work with the Central Authority of the United States to resolve abduction cases.

b. Hague Abduction Convention

Pakistan officially acceded to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Convention") on March 1, 2017, becoming the 96th Party to the Convention.

On May 1, 2017, the Convention entered into force between the United States and Fiji. Fiji was the 76th partner of the United States under the Convention. As described in a May 2, 2017 State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2017/05/270595.htm>:

The Convention is a valuable civil law mechanism for parents seeking the return of children who have been wrongfully removed from or retained outside their country of habitual residence by another parent or family member. Parents seeking access to children residing in treaty partner countries may also invoke the Convention. The Convention is critically important because it establishes a legal framework between partner countries to resolve parental abduction cases. The Department of State's Office of Children's Issues serves as the Central Authority for the United States under the Convention. We welcome this partnership with Fiji and look forward to working together on this critical issue.

The United States participated along with other Member States, organizations and observers, in the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, held from October 10-17, 2017. The conclusions and recommendations adopted by the Special Commission are available at <https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf>.

c. U.S.-Saudi Arabia Memorandum of Understanding

On July 17, 2017, U.S. Consul General Virginia Sher Ramadan and Saudi Arabia's Deputy Minister for Consular Affairs Tamim Bin Majed Al-Dosari signed, on behalf of their governments, a memorandum of understanding on international parental child abduction ("MOU"). The MOU establishes a joint commission to cooperate in cases of international parental child abduction. The full text of the MOU is available at <https://www.state.gov/s/l/c8183.htm>.

Cross References

*Draft General Comment on Article 6 of the ICCPR (regarding consular notification), Ch. 6.A.2.b
Children, Ch 6.C.*

Enhanced consular immunities, Chapter 10.D.2.

Family law, Ch 15.B.