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IMMIGRATION AND NATIONALIZATION SERVICE V. AGUIRRE-AGUIRRE 119 S. CT. 1439 (1999)

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FACTS

In 1994, Juan Anibal Aguirre-Aguirre ("Aguirre") appeared before an immigration judge in Las Vegas, Nevada, to plead for asylum and for withholding of deportation.[1] Aguirre sought political asylum and withholding of deportation because he believed that he would be murdered or seriously injured if he returned to his native Guatemala.[2]

Aguirre was a member of a politically active student group called *Estudeante Syndicado* ("ES")[3] from 1988 until he fled Guatemala in 1992. ES sought to effect change in Guatemala through protest, which often involved violent activities.[4] ES and Aguirre protested against the government's increase of their bus fares and possible complicity in the disappearance of student leaders.[5] In order to make the Guatemalan government take notice of its opposition to bus fare increases, ES began a campaign of systematic interruption of the bus system and intimidation of its passengers.[6] To manifest further student dissatisfaction with government treatment, action was also taken against store owners.[7]

The tactics that ES employed involved the seizing buses full of passengers.[8] ES would force the passengers from the bus.[9] Passengers who resisted ES's seizure of the bus were physically assaulted.[10] Members of ES would strike recalcitrant passengers with sticks, or bind them and physically remove them if they stayed.[11] Once emptied, ES members doused the buses with gasoline and set them on fire.[12] Aguirre participated in ten such incidents.[13]

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1. Brief for Respondent at 1, I.N.S. v. Aguirre-Aguirre, 119 S. Ct. 1439 (1999) (No. 97-1754).
2. *Id.*
3. 119 S. Ct. at 1443.
4. Aguirre-Aguirre v. I.N.S., 121 F.3d 521 (9th Cir. 1997).
5. *Aguirre-Aguirre v. I.N.S.*, 121 F.3d at 522. Bus fares were a major source of aggravation for Guatemalans. The Guatemalan government controlled the nationalized bus system and would arbitrarily raise and lower fares. As the bus system is the only means of transportation for the vast majority of the Guatemalan population, which lives in poverty, thus any increase in price met with disapproval.
6. *I.N.S. v. Aguirre-Aguirre*, 119 S. Ct. at 1444.
7. *Aguirre-Aguirre v. I.N.S.*, 121 F.3d at 525 (Kleinfeld, J., dissenting) Summarizing Aguirre's testimony in support his asylum petition, in which he detailed his involvement in the destruction of the personal property of many store owners and other Guatemalans.
8. 121 F.3d at 525 (Kleinfeld, J., dissenting).
9. *Id.* (Kleinfeld, J., dissenting).
10. *Id.* (Kleinfeld, J., dissenting).
11. *Id.* (Kleinfeld, J., dissenting).
12. *Id.* (Kleinfeld, J., dissenting).
13. *Id.* at 522.

Aguirre and ES also attracted the attention of the government by disrupting the local economy in various areas.[14] In a manner similar to their attacks on the national bus system, ES members entered, occupied and destroyed stores.[15] They advised the patrons to leave, and if they chose not to, ES members would forcibly eject them from the store.[16] This was accomplished by beating those who refused to leave the premises with sticks.[17] When the patrons were outside of the store ES members stoned them to make them disperse.[18] Once the store was emptied, ES members routinely took items contained therein.[19] All other items were thrown to the floor, doused with gasoline and burned.[20] Aguirre participated in several such attacks on stores.[21]

ES attracted the attention of the Guatemalan government.[22] The government appealed to ES on television to halt its protests.[23] Later, Aguirre and other members of ES received threats from the Guatemalan military.[24] Aguirre stated that he received correspondence on official government stationary warning him "to be a good citizen."[25] ES's actions also earned them the enmity of Guatemalan rebel groups.[26] Rebel groups viewed members of ES as sympathetic to the military.[27] Guatemalan students, such as Aguirre, were required to fulfill some level of mandatory military service, the connection to the military made them targets of rebel groups.[28] The rebel groups, characterized by Aguirre as left-wing guerrillas, made threats against Aguirre and other members of ES.[29] These threats were not idle. Five members of ES were found dead in the six months prior to Aguirre's flight from Guatemala.[30] As it was unknown whether these murders were committed by the military or guerrillas, Aguirre's situation in Guatemala was even more precarious.[31]

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14. 119 S. Ct. at 1444.
15. *Id.*
16. *Id.*
17. 121 F.3d at 525 (Kleinfeld, J., dissenting).
18. *Id.* (Kleinfeld, J., dissenting).
19. *Id.* (Kleinfeld, J., dissenting).
20. *Id.* (Kleinfeld, J., dissenting).
21. *Id.* (Kleinfeld, J., dissenting).
22. 121 F.3d at 524.
23. *Id.*
24. Brief for Respondent at 3, I.N.S. v. Aguirre-Aguirre, 119 S. Ct. 1439 (1999) (No. 97-1754).
25. *Id.*
26. 121 F.3d at 524.
27. Brief for Respondent at 4, I.N.S. v. Aguirre-Aguirre, 119 S. Ct. 1439 (1999) (No. 97-1754).
28. *Id.* at 3.
29. *Id.*
30. *Id.*
31. *Id.* at 6.

The Immigration Judge ("IJ"), whom Aguirre appeared before, found his testimony credible and granted both withholding and asylum on the basis that Aguirre would be persecuted for his political beliefs if he were returned to Guatemala.[32] The Immigration and Nationalization Service ("INS") appealed this ruling to the Board of Immigration Appeals ("BIA").[33] In an unpublished decision, the BIA reviewed the facts of the case and overturned the ruling of the IJ. According to the BIA, Aguirre's actions were non-political, leaving him ineligible for asylum or withholding of deportation.[34] Under section 1253 of Title 8 of the United States Code, withholding is not available to an alien who has committed a serious non-political crime before entering this country.[35] Thus, under the statutory regime, the BIA ruled that the "nature of his acts against innocent Guatemalans' made him unworthy of a favorable exercise of discretion . . . ."[36] Because the BIA considered Aguirre's actions more criminal than political, he was barred from withholding of deportation.[37]

In 1997, Aguirre appealed this ruling to the Court of Appeals for the Ninth Circuit, which eventually reversed the BIA's decision.[38] The appellate court found that the BIA erred as a matter of law on three points.[39] First, the BIA did not examine the crimes committed by Aguirre with respect to his stated political goals.[40] Second, the BIA did not consider the precedent in the circuit.[41] Third, the BIA failed to consider "the persecution that Aguirre might suffer if [he] returned to Guatemala."[42]

The appellate court pointed out that it had previously considered the non-political crime exception in *McMullen v. Immigration and Nationalization Service*.[43] In *McMullen*, the appellate court stated that Congress "intended the nonpolitical crimes exception to withholding of deportation to be consistent with the Convention [Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951)] and Protocol [Relating to Status of Refugees, 19 U.S.T. 622[4]

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32. 119 S. Ct. at 1444.

33. 8 C.F.R. § 3.1(d)(1) (1998). Pursuant to federal regulations, the BIA is vested with the authority to make this determination on behalf of the attorney general. Thus, the BIA has the derivative power to deny withholding if "there are serious reasons for considering that an alien has committed a non-political crime outside the United States prior to the arrival of the alien in the United States."

34. 121 F.3d at 522.

35. 8 U.S.C. § 1253(h)(2)(C) (1994). Withholding of deportation is mandatory unless an alien establishes that he or she would be in grave peril if returned to their native country. This is not available if "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior the arrival of the alien in the United States."

36. 121 F.3d at 522.

37. *Id.* at 522-23.

38. *Id.* at 522.

39. 119 S. Ct. at 1444.

40. 121 F.3d at 524.

41. *Id.*

42. *Id.*

43. 788 F.2d 591 (9th Cir. 1992).

(1968)]."[44] The relevant statutory provision was altered by the Refugee Act of 1980 [45] to comport with "the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees,[46] to which the United States acceded to in 1968."[47] The appellate court found that the concerns of *McMullen* also applied in this case.[48] According to the appellate court, Congress intended an examination of the term "refugee" as defined by Article 1 of the Convention and Protocol.[49] The Protocol definition excludes any person from refugee status who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[50] Thus, the appellate court applied U.N. protocol to Aguirre's appeal.

Under this analysis, the appellate court reasoned that the BIA did not consider the crimes that Aguirre committed in Guatemala "in relation to [his] declared political objectives."[51] According to the appellate court, 8 U.S.C. § 1253(h) must be applied consistently with the *McMullen* decision and the U.N. Protocol.[52] Through this application, the appellate court reasoned that Aguirre's actions were not taken for personal gain, as he acted to protest conditions in his native Guatemala.[53] The appellate court declared that there was a "close and direct causal link between the crimes committed and [their] alleged political purpose and object." [54] Thus, the appellate court reasoned that Aguirre, because of the political nature of his actions, was still within the definition of refugee used by both the U.N. and Congress.[55]

In scrutinizing the BIA's second error, the appellate court stated that the BIA should have made the determination as to whether "the crimes committed were grossly out of proportion to the alleged objective,"[56] and whether the

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44. 121 F.3d at 524.
45. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. (1980).
46. United Nations Protocol Relating to the Status of Refugees, Jan 31, 1967, 19 U.S.T. 6224.
47. 119 S. Ct. at 1446.
48. 121 F.3d at 523.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. United Nations, High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, Para. 152, U.N. Doc. HCR/IP/4/Eng/Rev. 1 [hereinafter Handbook]. "In determining whether an offence is 'non-political' or is, on the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offense is also more difficult to accept if it involves acts of an atrocious nature." *Id.*
55. 121 F.3d at 523.
56. Handbook, *supra* note 54, at Para. 152.

actions were "atrocious in nature."[57] The appellate court stated that the *McMullen* decision "cast[s] light on what under the law are acts of atrocious nature."[58] As the BIA did not use *McMullen* as its guideline to determine what type of action was "atrocious," the appellate court declared that the BIA did not follow precedent within the circuit.[59]

According to the appellate court, the BIA also erred in not considering the potential danger that awaited Aguirre if returned to Guatemala.[60] Again, the Court of Appeals looked to the U.N. Protocol for authority.[61] "If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him."[62] The appellate court determined from Aguirre's testimony that while still in Guatemala he and other student leaders received death threats sufficient to satisfy the future harm requirement.[63] The appellate court also found that the BIA did not attempt to balance the danger inherent in Aguirre's return to Guatemala with the nature of his admitted offenses.[64]

HOLDING

The Supreme Court of the United States, in a unanimous decision, reversed the decision of the appellate court and remanded the case for further proceedings.[65] The Court stated that the BIA has an affirmative duty to give meaning to ambiguous statutory terms "through a process of case-by-case adjudication."[66] In addition, the Court determined that the appellate court should have examined whether "the agency's [ruling was] based on a permissible construction of the statute" in question.[67] In light of what the

57. *Id.*

58. 121 F.3d at 524. The court of appeals found that McMullen's crimes, which included indiscriminate bombing, murder, torture and maiming of innocent civilians in conjunction with the Provisional Irish Republican Army, were not comparable to the crimes alleged against Aguirre. Because of the great difference in the crimes, the court of appeals believed that Aguirre was not deserving of the same treatment received by McMullen.

59. *Id.*

60. *Id.*

61. *Id.*

62. Handbook, *supra* note 54, at Para. 156.

63. 121 F.3d at 524.

64. *Id.*

65. 119 S. Ct. at 1442.

66. *Id.* at 1445 (quoting I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 448-49 (1987)).

67. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (stating that upon judicial review of agency's construction of statute it administers, relevant inquiry for court is whether agency's construction was permissible). *See also* I.N.S. v. Cardoza-Fonseca, 480 U.S. at 448-49.

Court perceived to be the BIA's correct interpretation of § 1253(h) and the principles set forth in *Chevron*, the Court reversed the appellate court and remanded the case.[68]

ANALYSIS

In reversing and remanding the decision of the appellate court, the Supreme Court stated that the BIA, not the appellate court, is the final arbiter regarding the interpretation of statutes that it administers.[69] According to the Court, deference must be given to the BIA's interpretation of the relevant statute due to the inability of the judiciary to make determinations that may affect foreign relations.[70] The "judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions."[71] Deference is "especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[72]

The Court found that the appellate court erred in interpreting the relevant statute itself, rather than deferring to the interpretation of the BIA.[73] In its interpretation of § 1253(h), the appellate court stated that the BIA must balance Aguirre's criminal acts against the possibility of persecution in Guatemala.[74] The Court also stated that the analysis of the appellate court was flawed in its determination that the *McMullen* decision controlled as to whether Aguirre's crime was in fact atrocious.[75] Finally, the Court found that the appellate court erred in weighing heavily the necessity and success of Aguirre's actions.[76]

As the appellate court noted, the outcome of this case depended, in a most basic sense, on the interpretation given to one statute.[77] Pursuant to this statute, the BIA determined that Aguirre's actions rose to the level of a serious nonpolitical crime. The BIA employed its interpretation of the statute to evaluate Aguirre's actions.[78]

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68. 119 S. Ct. at 1449.
69. *Id.* at 1445
70. *Id.*
71. *Id.*
72. *Id.* (quoting I.N.S. v. Abudu, 485 U.S. 94, 110 (1998)).
73. *Id.* at 1446.
74. *Id.*
75. *Id.*
76. *Id.*
77. 121 F.3d at 523.
78. *Id.* at 524.

In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.[79]

The BIA found "the criminal nature of the respondent's acts outweigh their political nature."[80] According to the BIA, destruction of property and violence against civilians were not political, despite the fact Aguirre and ES had political goals.[81]

Although overturned by the appellate court for failing to consider other factors in its determination, the Supreme Court found the BIA analysis to be within the constraints of the statutory structure set forth by Congress.[82] Consequently, the Court reversed the decision of appellate court.[83]

The Court specifically rejected the appellate court's balancing of Aguirre's criminal acts against the possibility of persecution if he returned to Guatemala.[84] The BIA had previously rejected any interpretation of the phrase "serious nonpolitical crime" in 8 U.S.C. §1253(h)(2)(C).[85] The Supreme Court found the BIA's reading of the statute more convincing than that of the appellate court, as the plain language of the statute does not suggest the need to examine the possibility of persecution in the event that the applicant is returned to his country.[86]

The Court stated that the appellate court relied too heavily on the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ("U.N. Handbook").[87] The appellate court went beyond § 1253, into which Congress incorporated many elements of Article 33 of the U.N. Handbook, and applied Paragraph 156 of the U.N. Handbook, which had not been so incorporated.[88] Paragraph 156 stresses the importance of "strik[ing] a balance between the nature of the offense presumed to have been committed by the applicant and the degree of persecution feared" by the applicant if deported.[89] In discussing the handbook, the Court stated

79. Matter of McMullen, 19 I. & N. Dec. 90, 97-98 (BIA 1984).
80. 119 S. Ct. at 1444.
81. *Id.*
82. *Id.*
83. *Id.* at 1445.
84. *Id.* at 1446.
85. Matter of Rodriguez-Coto, 19 I. & N. Dec. 208, 210 (1985).
86. 119 S. Ct. at 1445.
87. *Id.* at 1447.
88. *Id.* at 1446.
89. Handbook, *supra* note 54, at Para. 156.

that the U.N. Handbook "is a useful interpretive aid, but is not binding on the Attorney General, the BIA or United States courts."[90]

The Supreme Court also found that the appellate court relied too heavily on U.N. protocol when determining that the crimes committed by Aguirre were not atrocious in nature and were proportionate to his desired ends.[91] The Court pointed out that the appellate court referred to Paragraph 152 of the U.N. Handbook when it stated that the BIA should have considered if the acts committed were "grossly out of proportion to the alleged objective."[92] In addition, the Supreme Court found it troubling that the appellate court used *McMullen* to determine whether an act was "atrocious."[93] The Supreme Court concurred with the BIA that a non-atrocious act could also be a serious nonpolitical crime, and thus, sufficient enough to make an actor ineligible for withholding.[94] "If atrocious acts were deemed a necessary element of all serious nonpolitical crimes, the Attorney General would have severe restrictions upon her power to deport aliens who had engaged in serious, though not atrocious, forms of criminal activity."[95]

The Supreme Court rejected the appellate court's finding that the BIA failed to consider Aguirre's "offenses in relation to [his] declared political objectives."[96] The BIA initially held that there was not a satisfactory link between Aguirre's activities in Guatemala and his alleged political objectives.[97] Thus, Aguirre had the burden of showing that a causal link between the action and the objective existed.[98] Because he failed to submit a brief to the BIA on this issue, the Court held that the analysis and decision of the BIA did not warrant reversal.[99]

CONCLUSION

Under the Court's analysis, the BIA has the final word on the immigration statutes that it administers, and its decisions appear to be outside the scope of judicial review. Such a development places a great deal of power in the BIA, as a reviewing court does not have the authority to undertake a complete a *de novo* review of such a case. Thus, the reviewing court is presented with only

90. 119 S. Ct. at 1447.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 1448.
96. *Id.*
97. *Id.* at 1449.
98. *Id.*
99. *Id.*

the opportunity to review the agency's interpretation of the relevant statute. If that interpretation is not rational, the court can then overturn the agency's decision, but if it is rational, the court must affirm the decision. Under this ruling, it is not within the purview of the reviewing court to rule on the appropriateness or quality of the agency's decision, but only to examine whether the ruling was rational and consistent with other agency decisions. Without plenary power to review a case, the position of the reviewing court is weakened. The reviewing court has no choice but to re-interpret the relevant statute if the court believes that the BIA has misinterpreted the statute or has improperly performed its role of fact-finder. Under this scheme, the reviewing court cannot make statutory interpretations, as only the agency has the authority to interpret the relevant statute.

This decision grants unfettered discretion to the BIA in interpreting the statutes it administers. The Court, citing statutory construction and prudential considerations, has narrowly circumscribed the power of reviewing courts and expanded the role of government agency adjudication. As in *Chevron*, the Court has transferred a great deal of power to the BIA. With this ruling, the Supreme Court has removed all but the most minimal judicial oversight from the executive agency charged with administering immigration statutes.

Although it is unclear to what affect this will have on immigration and immigrants, it is possible that the executive branch could use this newfound discretion to regulate or allow only selective immigration to this country. Or, perhaps this ruling will serve to chill political reform in countries that are oppressive to their citizenry. The United States has always been a beacon and a refuge for those who have been oppressed and for political dissidents. This new regime could change that label.

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