The Commonwealth of Massachusetts
Committee for Public Counsel Services
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Immigration Case Notes for Massachusetts Criminal Defense Attorneys
November 2012

Massachusetts Appeals Court

Commonwealth v. Karim Chleikh, 2012 Mass. App. LEXIS 275 (Mass. App. Ct. Nov. 9, 2012)

This case was an appeal of the denial of a motion to vacate under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Mr. Chleikh, a lawful permanent resident, pled guilty to four offenses: assault and battery by means of a dangerous weapon, witness intimidation, assault and battery, and threats. On the first three offenses he received concurrent sentences of two and one half years in the House of Corrections, fifteen months to serve with the balance suspended for two years. He received six months in the House of Correction for the threats offense, concurrent with count one. The convictions for assault and battery, assault by means of a dangerous weapon, and witness intimidation, each with a sentence of imprisonment of one year or greater, are aggravated felonies. These convictions made Mr. Chleikh removable and ineligible for almost all forms of relief from removal.

Mr. Chleikh argued in a motion to vacate that his trial counsel was ineffective for providing only a general immigration warning (similar to the judicial warning under G.L. ch. 278 §29D), where a warning as to the specific immigration consequences he was facing from this case was required under *Padilla*. He submitted an affidavit asserting that had he known of the immigration consequences he would have tried to negotiate sentences of less than one year to avoid aggravated felonies or risked trial. He also submitted an affidavit from trial counsel, who maintained that he gave Mr. Chleikh general warnings, thinking that the immigration consequences were unclear. The trial judge denied the motion, finding that Mr. Chleikh may have shown deficient performance, but he failed to show the necessary prejudice.

The Appeals Court affirmed the decision of the trial judge, similarly holding that while Mr. Chleikh may have established deficient performance, he had not established prejudice. As an initial matter, the court agreed that the immigration consequences were clear, that they all but guaranteed deportation as well as denial of discretionary relief from removal, and that specific advice was therefore required.

The court then turned to the three potential grounds of prejudice outlined in *Commonwealth v. Clarke*, 460 Mass. 30 (2011). The court concluded (1) that Mr. Chleikh failed to show that there was any viable defense to the charges, in light of powerful evidence (injuries to the victim, statements overheard by a police officer, flight by defendant), (2) that he had not sufficiently established that an alternative plea was possible, given that the Commonwealth was pushing for significant committed time and the trial judge noted the risk of even more committed time after trial, and (3) that he had failed to offer any detail regarding "special circumstances" that would have made him "place particular emphasis on immigration consequences" such that he would have gone to trial despite the risks. Having failed to show prejudice under any of the three methods outlined in *Clarke*, the Appeals Court denied Mr. Chleikh's appeal.

Practice Tip

Establishing prejudice may often be more difficult than showing deficient performance, but it is equally important to success on a *Padilla* motion. Include as much detail as possible in affidavits and supporting evidence, including any evidence of a potential defense, viable plea options that would minimize immigration consequences, and all facts to support the argument that there are special circumstances that would have caused your client to risk a difficult trial rather than face deportation. This might include the extent of his/her family and community ties in the United States, his/her limited support in his/her native country, any employment history in the U.S, inability to speak the native language, and any danger he/she might face if deported.

With respect to the possibility of negotiating a plea that avoided the aggravated felony consequences, trial counsel could have constructed a plea that took advantage of the multiple counts to give Mr. Chleikh a similar period of incarceration but avoid aggravated felonies. A committed sentence of 364 days on count one, with a sentence of 364 days on and after for count two, followed by two years of probation on and after on count three, would have resulted in the same period of incarceration and probation while avoiding aggravated felonies.

Massachusetts Appeals Court (unpublished)

Commonwealth v. Alvarado, 2012 Mass. App. Unpub. LEXIS 1188 (Nov. 21, 2012)

Mr. Alvarado appealed the denial of his motion to withdraw his guilty plea pursuant to *Padilla*, in which the trial court concluded that while Mr. Alvarado had demonstrated deficient performance, he had failed to establish prejudice. In this short unpublished decision, the Appeals Court reversed the trial court, concluding that Mr. Alvarado had established prejudice under *Clarke*. In particular, under the third method of prejudice outlined in *Clarke*, the court found that he had demonstrated the presence of "special circumstances" to support the conclusion that he "would have placed particular emphasis on immigration consequences in deciding whether or not to plead guilty." The court relied on the undisputed evidence that Mr. Alavarado had temporary protected status (TPS) and "important relationships with his wife and child, who is a citizen" to find that he had established prejudice. Significantly, the Appeals Court stated, "The Commonwealth's argument that the defendant had no defense to the charges is not persuasive, nor in any event, dispositive in this context."

Practice Tip

This decision exemplifies the significance of the third method of establishing prejudice under *Clarke*. As discussed above, attorneys preparing motions under *Padilla* should remember that even where success at trial was unlikely and an alternative plea was unavailable, it is still

possible to make a strong showing of prejudice if you can establish that your client would have risked a difficult trial in order to remain in the United States. Be sure to include as many details as possible in your pleadings, by way of affidavits and other evidence, to support this argument.

Board of Immigration Appeals

Matter of Sanchez-Lopez, 26 I. & N. Dec. 71 (BIA 2012)

This case raises an issue of first impression: what is the definition of "a crime of stalking," which is a ground of deportability. Mr. Sanchez-Lopez, a lawful permanent resident, was convicted of stalking in violation of section 646.9(b) of the California Penal Code. Based on this conviction, the Immigration Judge found him subject to removal under 8 U.S.C. § 1227(a)(2)(E)(i) for "a crime of stalking." The judge further denied his application for cancellation of removal in the exercise of discretion.

On appeal, the Board of Immigration Appeals (BIA) adopted the following generic definition of "crime of stalking" pursuant to 8 U.S.C. § 1227(a)(2)(E)(i):

(1) Conduct that was engaged in on more than a single occasion,
(2) Which was directed at a specific individual,
(3) With the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death.
(4) The BIA left undecided the precise contours of a fourth element regarding the consequences of the conduct. Specifically, the Board declined to resolve whether proof of subjective consequences alone is sufficient (i.e. that the victim "was, in fact, placed in fear of bodily injury or death"), or if proof of objective consequences is required ("that a reasonable person in the circumstances would have been placed in such fear") or if both objective and subjective elements are necessary. Since the California statute requires proof of both subjective and objective consequences, the BIA found it unnecessary to resolve the issue in this case.

The BIA ultimately concluded that the California stalking statute qualified as a "crime of stalking" under § 1227(a)(2)(E)(i) and that the Immigration Judge properly found Mr. Sanchez-Lopez to be removable. Finally, the BIA affirmed the Immigration Judge's denial of cancellation of removal.

Practice Tip

The Massachusetts stalking statute, Mass. Gen. L. ch. 265, sec. 43, tracks the generic definition of "crime of stalking" fairly closely – at least with respect to the first three elements outlined by the BIA. Therefore, it is likely that immigration officers will charge non-citizens who have been convicted under this statute as being removable for having a "crime of stalking." As to the fourth element, however, the Massachusetts offense requires only that the person be seriously alarmed and "suffer substantial emotional distress," as compared to the California statute analyzed in this case which requires "fear of bodily injury or death." Depending on the circumstances of your case, an argument may exist in immigration court that the record of conviction does not satisfy the fourth element, and is therefore not a "crime of stalking." If you have a non-citizen charged with stalking, please contact the IIU to discuss this further.

Matter of Valenzuela-Felix, 26 I. & N. Dec. 3 (BIA 2012)

This case addresses the complicated and important subject of when a lawful permanent resident ("LPR" – green card holder) can be treated as an arriving alien and therefore be removed based on grounds of inadmissibility, rather than deportability. Generally, LPRs are not considered arriving aliens, even if they leave the U.S. and attempt to return. Only arriving aliens can be removed for being inadmissible. This is significant because the grounds of inadmissibility are sometimes harsher than the grounds of deportability.

Mr. Valenzuela-Felix was a lawful permanent resident of the United States. In June 2009, he was indicted for a federal cash smuggling offense but left the U.S. while the case was pending. In August 2009, he returned from a trip abroad and the Department of Homeland Security (DHS) "paroled" him into the U.S. for the criminal prosecution. In July 2010, he was convicted of the smuggling offense. DHS then initiated removal proceedings, charging that he was "inadmissible" for having been convicted of smuggling, which is a crime involving moral turpitude (CIMT).

The issue on appeal was whether DHS can parole lawful permanent residents (LPRs) who arrive at the U.S. border into the U.S. and then seek to prove that they are inadmissible based on a subsequent conviction. "Parole" is a legal fiction that allows DHS to permit a non-citizen to enter the U.S. without legally "admitting" them, pursuant to 8 U.S.C. § 1182(d)(5). "Admission" is statutorily defined as "the lawful entry of the alien into the [U.S.] after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13). LPRs are presumed not to be seeking admission when attempting to re-enter the U.S., unless they fall into one of several exceptions under §1101(a)(13); determining whether an LPR with criminal convictions is seeking "admission" when attempting to re-enter the U.S. requires a complicated analysis based on the statutory definition and substantial case law.

The BIA concluded that what DHS did in this case was permissible; therefore, a non-citizen may be paroled into the U.S. for prosecution and, if convicted, be denied re-entry due to a ground of inadmissibility based on such conviction. In short, the BIA determined that even though DHS did not have probable cause to believe that Mr. Valenzuela-Felix was inadmissible at the time that he returned to the U.S. in August 2009, and even though as a lawful permanent resident he was not to be considered to be seeking admission, DHS properly refused to admit him at the border and instead paroled him into the U.S. and then validly sought his removal for being inadmissible based on a conviction he received after his return (for conduct that occurred before he left the U.S.).

<u>Practice Tip</u>

This decision has the potential to significantly impact our lawful permanent resident clients who leave the U.S. while their criminal cases are pending. LPR clients with pending criminal charges should be warned that if they leave the U.S. and attempt to return, DHS may choose to parole them into the U.S., rather than admit them, and wait to see how the criminal cases resolve. Upon conviction, such clients can be denied re-entry if their offenses fall within grounds of inadmissibility. This is particularly significant for longterm LPRs charged with CIMTs (while an LPR is not deportable for a single CIMT that occurs more than five years after their admission to the U.S., one CIMT will make an LPR inadmissible).

Matter of Sanchez-Herbert, 26 I. & N. Dec. 43 (BIA 2012)

Mr. Sanchez-Herbert left the United States while removal proceedings were pending. The Immigration Judge terminated proceedings, reasoning that she lacked jurisdiction over Mr. Sanchez-Herbert when he was outside the U.S. On appeal, the Board of Immigration Appeals (BIA) reversed the decision of the Immigration Judge, holding that Mr. Sanchez-Herbert's departure did not divest the Immigration Judge of jurisdiction. Therefore, the Immigration Judge should have proceeded with removal proceedings and determined whether the Department of Homeland Security had met its burden of showing that Mr. Sanchez-Herbert had received notice of the proceedings and was removable as charged.