Final BIA Decision Overturning Removal Order Based on One Theory Precludes New NTA Based on Different Ground of Removal.

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[1] INTRODUCTION: Final BIA Decision Overturning Removal Order Based on One Theory Precludes New NTA Based on Different Ground of Removal.
By: Norton Tooby and Joseph Justin Rollin

In Murray v. Ashcroft, ___ F. Supp. 2d ___, 2004 WL 1368391 (D. Conn. June 9, 2004), the United States District Court granted federal habeas corpus, holding a second removal order was unlawful, and directed the BIA to vacate the second removal order and terminate removal proceedings against a noncitizen. Although two circuit court decisions have applied the doctrine of res judicata to determinations of citizenship, this is possibly the first published federal decision to apply the doctrine to charges of deportation or inadmissibility in removal proceedings.

[2] ONLINE RESOURCES:

Medina v. INS, 1 F.3d 312, denying reh'g of 993 F.2d 499 (5th Cir. 1993), may be viewed without charge at: http://www.ca5.uscourts.gov/opinions/pub/92/92-5305.CV0.wpd.pdf

BIA decisions may be viewed without charge at: http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html

D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes is online at www.westlaw.com.


Murray v. Ashcroft, ___ F. Supp. 2d ___, 2004 WL 1368391 (D. Conn. June 9, 2004), holds that the doctrine of res judicata applies to charges filed on a Notice to Appear (NTA) or Order to Show Cause. The INS initiated removal proceedings against Murray by charging him as an aggravated felon, under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), on the basis of two marijuana convictions. The BIA sustained the noncitizen's appeal from a removal order, and terminated proceedings, finding the convictions did not constitute an aggravated felony. The INS then filed a new NTA on the ground that Murray was deportable as a noncitizen convicted of controlled substance offenses. The new NTA was based upon the two previously charged marijuana convictions, and a third conviction that was in the record at the time of the initial proceedings. The respondent filed a motion to terminate on the basis of a claim that res judicata barred the second NTA. The Immigration Judge denied the motion. The BIA affirmed.

The doctrine of res judicata embraces two distinct preclusion concepts: claim preclusion and issue preclusion. See United States v. Shanbaum, 10 F.3d 305 (5th Cir. 1994); see also Robi v. Five Platters, Inc., 838 F.2d 318 (9th Cir. 1988). In either case, the issues may rest on a factual determination, a pure legal issue or a combination of fact and law. See Medina v. INS, 993 F.2d 499 (5th Cir. 1993).
Claim preclusion (or "pure res judicata") applies when: 1) the parties in a later action are identical to or in privity with the parties in a prior action; 2) the judgment in the prior action was rendered by a court of competent jurisdiction; 3) the prior action concluded with a final judgment on the merits; and 4) the same claim or cause of action is involved in both suits. Included in the doctrine of claim preclusion is the idea of waiver. "If a party does not raise a claim or a defense in the prior action, that party thereby waives its right to raise that claim or defense in the subsequent action. . . . [T]he effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial." United States v. Shaunbaum, 10 F.3d at 311 (internal quotation marks and citation omitted). Claim preclusion therefore applies to claims that "were or could have been" raised in the prior action. Allen v. McCurry, 449 U.S. 90, 94 (1980).

Issue preclusion (or "collateral estoppel") treats specific issues of fact or law that are validly and necessarily determined between two parties as finally and conclusively decided. Issue preclusion is appropriate where: 1) the issue under consideration in a subsequent action is identical to the issue litigated in a prior action; 2) the issue was fully and vigorously litigated in the prior action; 3) the resolution of the issue was necessary to support the judgment in the prior case; and 4) there are no special circumstances that would render preclusion inappropriate or unfair. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-32 (1979). If these conditions are satisfied, issue preclusion prohibits a party from seeking another determination of the litigated issue in the subsequent action. Id.

On petition for habeas corpus, in Murray, the district court applied the doctrine of claim preclusion, or pure res judicata, and held that the immigration authorities were precluded from filing a new NTA charging a different ground of removal that was based upon convictions that were part of the record in the initial proceedings. The court relied upon Medina v. INS, 993 F.2d 499, 503-4, reh'g denied, 1 F.3d 312 (5th Cir. 1993) (precluding INS from bringing a second challenge to finding of United States citizenship), to find that the doctrine of res judicata applied to administrative immigration decisions. The court rejected the INS argument that Medina was distinguishable because that case dealt with a challenge to a finding of citizenship, rather than charges of removal. See also
Ramon-Sepulveda v. INS, 824 F.2d 749 (9th Cir. 1987) (applying res judicata to finding of alienage and denying INS motion to reopen since the basis for the motion was not in fact new evidence).

The district court stated:

The doctrine [of res judicata] applies equally in the context of immigration proceedings. Medina v. INS, 993 F.2d 499, 503-4 (5th Cir. 1993) (applying res judicata to final, valid judgments of the BIA). As the Fifth Circuit stated:

Few legal doctrines are more intrinsic or necessary in our system than res judicata. That doctrine, which provides that a valid and final judgment precludes a second suit between the same parties on the same claim or any part thereof, ensures that litigation will come to an end.

Medina v. INS, 1 F.3d 312, 313 (5th Cir. 1993).

Respondents argue that res judicata should not apply to immigration removal proceedings involving a criminal alien. However, as Medina warns, carving out a large exception to the res judicata doctrine "would allow the agency to eschew direct appeal -- either inadvertently, through error, or consciously as a strategic decision - then years later, collaterally attack decisions of immigration judges."

The Court finds that no exception to the res judicata doctrine is warranted in this context. Res judicata applies to immigration removal proceedings. Here, the second charge is based on same nucleus of operative facts that were known or should have been known when the removal charge based on conviction of an aggravated felony was brought at the first proceeding. All of the facts concerning his drug convictions are related in time, origin and motivation. These underlying facts form a convenient unit for adjudication. Further, it conforms to party expectations that all of the charges against petitioner based on these underlying facts should be resolved in one adjudication.

Accordingly, the second charge of removability, which could have been brought in the prior proceeding, was barred by res judicata. Thus, the order of removal is invalid. The Court will grant the petition for habeas corpus relief.
Murray v. Ashcroft, ___ F. Supp. 2d ___, 2004 WL 1368391 at *2. The court therefore found that the second removal order was contrary to law, and directed the BIA to vacate petitioner's final order of removal and issue an order terminating proceedings.

The nearest to a doctrine of res judicata in immigration proceedings thus far comes from the line of cases culminating in Matter of Rainford, 20 I. & N. Dec. 598 (BIA 1992), and including Matter of Rafipour, 16 I. & N. Dec. 470 (BIA 1978), Matter of Sanchez, 16 I. & N. Dec. 363 (BIA 1977), and Matter of R-G-, 8 I. & N. Dec. 128 (BIA 1958). The BIA has found that Congress allowed for the possibility that noncitizens deported on some basis could be allowed to apply for, and obtain, subsequent readmission to the United States in the future, without having to face a charge of deportation on the same basis as the original charge. Matter of S-, 7 I. & N. Dec. Dec. 536 (BIA 1957). See INA § 212(a)(9) (allowing for admission of certain removed noncitizens after a statutory period). On this basis, the BIA has found in these cases that the INS cannot place a noncitizen in removal proceedings, following the noncitizen's successful [re]adjustment of status after having already been found removable, by charging the noncitizen under the same ground, or a different ground of removal on the basis of the same acts, upon which the initial finding was based.

Although the Rainford line of cases may have created a pseudo res judicata doctrine based upon an apparent intent by Congress, this line of cases has so far only dealt with noncitizens seeking adjustment of status following a finding of deportability, and only goes so far as to cover subsequent charges of deportation that are identical to the initial charges, or are based on the same activity.

[4] ARTICLE PART II: Implications

There are a number of potential implications of Murray, Medina, and Ramon-Sepulveda:

(1) Pure Res Judicata v. Collateral Estoppel: Murray appears to be the first federal published decision to apply the doctrine of claim preclusion (pure res judicata) to immigration proceedings, rather than merely issue preclusion (collateral
estoppel). Both Medina and Ramon-Sepulveda were collateral estoppel cases.

(2) Implied Waivers: By applying claim preclusion, including the idea of issue waiver, to immigration proceedings, the INS should be required to charge all available removal grounds simultaneously, so as not to harass the noncitizen with piecemeal, successive litigation.

(3) Express Waivers: In Medina, the INS argued that res judicata did not apply, as the INS had conceded the respondent's citizenship in the initial proceeding, and therefore the INS did not have an opportunity to litigate the issue during the first proceedings. The court rejected this argument, finding that there was an opportunity to litigate the issue, but the opportunity was waived by the INS. 993 F.2d at 504, n. 18. Given this aspect of res judicata, concessions of legal issues should not be taken lightly.

(4) Pre & Post IIRAIRA: Res Judicata may not be applicable in a case where a respondent's initial proceedings were terminated prior to the passage of IIRAIRA, and the INS served a second NTA after IIRAIRA, on the basis of legislative additions to the aggravated felony definition. Unlike the case in Medina, the INS would not have had an opportunity to charge the respondent as an aggravated felon in the first instance.

(5) Uncharged Convictions: Murray did not limit its holding to only the two charges that were included in the initial NTA, but also applied claim preclusion res judicata to a third conviction, that was included in the second NTA, but not the first. This means that if the INS charges less than all convictions in a respondent's pre-existing criminal history as finding a basis for an initial charge of removal, the INS loses the opportunity to base a charge on the uncharged convictions after the immigration proceedings have terminated. But see 8 C.F.R. § 1003.30 (INS may file additional charges at any time during proceedings).

(6) Multiple CIMTs: This does not mean, however, that the INS cannot use a previously charged conviction in combination with a new conviction to charge a respondent in a subsequent NTA with deportability as a noncitizen convicted of multiple CIMTs. Cf. Matter of Gordon, 20 I. & N. Dec. 52, 56 (BIA 1989) (CIMT conviction previously waived by 212(c) can be used in
charging respondent with deportability for multiple CIMTs in combination with subsequent conviction).

(7) Errors of Fact or Law: Medina stated that "it makes no difference that the final, valid judgment may be based on an erroneous factual finding or an erroneous understanding of the law or both. The only considerations for purposes of res judicata is whether the judgment was final, valid, and there was an opportunity to reach the merits." 993 F.2d at 504. Therefore, even if the decision of the immigration judge was based upon some sort of error, res judicata still bars relitigation of the issues presented, or the issues that could have been presented.

(8) There may be an argument that the INS cannot charge a respondent with inadmissibility on basis of a conviction, then, after proceedings are terminated and the noncitizen is admitted to the United States, file a second NTA charging the noncitizen with deportation on the basis of the same conviction. As former "exclusion" and "deportation" proceedings have been consolidated into unitary "removal" proceedings, the INS is arguably required to charge both the applicable grounds of inadmissibility and deportability during the initial proceedings. But see Zavala v. Ridge, 310 F.Supp.2d 1071 (N.D. Cal. 2004) (fact situation: proceedings terminated after petty offense exception found by IJ to apply to returning LPR convicted of CIMT; INS then filed new NTA charging deportability as aggravated felon). Although grounds of deportation do not apply to a noncitizen seeking admission, charging otherwise applicable grounds of deportability in the NTA in cases like Zavala would conform with the concept of consolidated "removal" proceedings, would give the respondent notice of issues, and would promote administrative and judicial economy should the respondent be found not inadmissible.

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