



FOR IMMEDIATE RELEASE

January 13, 2009

COURT URGED NOT TO PERMIT ALIENS TO DELAY DEPORTATION PENDING APPEAL

(Nken v. Mukasey, No. 08-681)

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to restrict the power of federal courts to delay the deportation of aliens while they appeal a removal order. WLF urged the Court to rule that such delays are not permissible in the absence of clear and convincing evidence that the removal order was issued in violation of federal immigration law.

In a brief filed in *Nken v. Mukasey*, WLF argued that a provision of the 1996 immigration reform law, 8 U.S.C. § 1252(f)(2), imposes a strict standard that must be met before a stay of deportation may properly be issued. WLF argued that Congress contemplated that in most instances an alien who seeks to fight a deportation order should return home and carry out his appeal from overseas.

"The federal courts are undermining the effectiveness of immigration enforcement efforts when they routinely block deportation while they are reviewing final orders of removal," said WLF Chief Counsel Richard Samp after filing WLF's brief. "The ready availability of such delays frequently permits savvy attorneys to postpone indefinitely the deportation of their alien clients," Samp said.

The case before the Supreme Court involves Jean Marc Nken, a Cameroon citizen who entered the country on a temporary transit visa in 2001 and has been fighting deportation proceedings ever since. The Board of Immigration Appeals (BIA) issued a final order of removal in June 2006, rejecting Nken's claim for asylum. Since then, Nken has filed three separate motions with the BIA to reopen removal proceedings; all three were denied. The U.S. Court of Appeals for the Fourth Circuit in Richmond has denied appeals from the first two. The appeal from denial of the third petition to reopen is still being heard, and the Fourth Circuit denied a motion to "stay" his removal while it hears this latest appeal. Nken is asking the Supreme Court to "stay" his deportation until after the Fourth Circuit rules on the petition. The Supreme Court is hearing the case on an extremely expedited basis, so as to avoid further delays; it granted Nken's petition for certiorari in December, the case is scheduled to be argued orally before the Court on January 21, and a final decision is expected by this spring.

Nken urges the Court to adopt a rule that would grant federal appeals courts relatively free rein to grant a stay of deportation pending consideration of the alien's petition for review of the removal order. The issue before the Court -- whether the strict standard set forth in 8 U.S.C. § 1252(f)(2) applies to motions for stay pending review -- is one that has sharply divided the federal appeals courts. The Fourth Circuit is one of two appeals courts that have held that § 1252(f)(2) does, in fact, apply to motions for stay of removal pending appeal.

In its brief urging the Court to affirm the Fourth Circuit, WLF argued that the text of § 1252(f)(2) makes plain Congress's intent that stays pending appeal would be governed by the statute's strict requirements: it provides that "no court shall enjoin the removal of any alien" unless those strict requirements are met. Nken asserts that an order to "enjoin" removal is somehow different from an order to "stay" removal and thus that his motion to stay removal is not covered by § 1252(f)(2). WLF argued in response that Congress routinely uses the words "enjoin" and "stay" interchangeably and deems a "stay" to be a subset of an "injunction." WLF also asserted that § 1252(f)(2) would be rendered meaningless if it did not apply to motions for stay pending appeal, because the statute has no conceivable alternate applications.

WLF is a public interest law and policy center with supporters in all 50 States. It devotes a significant portion of its resources to supporting the prompt deportation of aliens who enter or remain in the United States in violation of our law, thereby ensuring that those aliens do not take immigration opportunities that might otherwise be extended to others. WLF filed its brief in this case on behalf of itself and the Allied Educational Foundation.

* * *

For further information, contact WLF Chief Counsel Richard A. Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.