

Scaling the Walls

I have always had a fascination with the federal court system. Perhaps my college and law school experience working with the attorney who defended the men who broke into the Watergate in 1973 had something to do with that interest. Sitting in the federal court in Washington, D.C., every day by the side of trial counsel was about as much excitement as I could handle at the time. Attending a national law school in Washington, D.C., at Georgetown, was a great impetus to appreciating the work of the federal courts. The United States Supreme Court was just a few blocks away, and many of us would go up and watch the public sessions when an infusion of enthusiasm was needed. Then there was, of course, working for Judge Malcolm Muir in the Middle District of Pennsylvania. A more active mind and a harder worker would be difficult to find in any judicial role.

I have also had the privilege, over the years, of attending the Third Circuit Judicial Conferences. The Third Circuit is the federal court system, which includes Pennsylvania, New Jersey, Delaware, and our very own colony paradise, the United States Virgin Islands. I have even visited the Federal Courthouse in the United States Virgin Islands. The Courthouse overlooks the harbor in Charlotte Amalie, and is in the style of the modern Dutch metropolis which looks south to the Caribbean Sea. Now how exactly did I wind up practicing law in the cold, North Central Pennsylvania? Well that's another story, and one I will not take up here.

All of this leads me to explain why I read decisions by the United States Court of Appeals, even when they are labeled "non-precedential." All opinions of the Third Circuit are now published, but the Court specifically says that some of them do not stand for any binding principle, except in that particular case.

Most of the non-precedential opinions I read these days have to do with immigration issues, and most of those immigration issues are people seeking asylum in the United States. In fact, the number of cases is overwhelming. Why are all these people seeking asylum in the United States, and what is the law on the subject?

An asylum applicant bears the burden of establishing eligibility for asylum. To be eligible, the applicant must qualify as a refugee; this requires a showing that the petitioner is unable or unwilling to return to the country of origin because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The applicant can meet this burden by (1) showing past persecution, which creates the rebuttable presumption of a well-founded fear of persecution, or (2) establishing a well-founded fear of future persecution.

The cases discussed by the court contain fascinating and sometimes very creative facts. The courts define persecution as including threats to life, confinement,

torture, and economic restrictions so severe that they constitute a threat to life or freedom while recognizing that persecution does not encompass all treatment our society regards as unfair, unjust, or even unlawful or unconstitutional.

Most asylum seekers lose their cases in court. Even without a showing of past persecution, however, an asylum applicant can establish a well-founded fear of future persecution if there is credible testimony showing a genuine subjective fear of persecution and there is demonstration as an objective matter that a reasonable person in the alien's circumstances would fear persecution if returned to the country in question. It is amazing all the people around the world who fear persecution, future persecution, and claim that they should receive asylum in the United States.

The asylum cases are first heard by the Bureau of Immigration Appeals, and from there the cases go to the United States Court of Appeals in the appropriate region of the country. One asylum seeker claimed that the administrative agency erred by determining that visibly wealthy Ukrainians do not qualify as a particular social group for purposes of asylum. The claim was denied.

The United States is, for many people, the golden citadel whose streets are paved with diamonds. All over the world there are people in Muslim countries, Christian countries, animist societies, and you name it, who want to come to the United States and claim that they are entitled to asylum. Those people receive hearings before administrative agencies and the Court of Appeals. It is inherent in the fair nature of our society and legal system that we give hearing to these people, sometimes at great expense to the taxpayer. Nevertheless, our political system has always taken the position that it is better to tax our citizens and spend money for due process, rather than indiscriminately to deny asylum seekers their day in court. Of course, these people are non-Americans and are not citizens. There is no constitutional right to asylum, and the aliens could simply be shipped back to their country of origin. Our asylum laws, based on international law, gives those asylum seekers a chance at the platinum ring.

The courts are busy and judges are to be congratulated in hearing these cases as such a great part of their workload. Whether our laws are too liberal or are too conservative in connection with how we treat aliens is a debate which doubtless will be heard in the upcoming presidential election.

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