



Attys React To Term's Final High Court Immigration Rulings

Law360, New York (June 15, 2015, 7:01 PM ET) -- Today the [U.S. Supreme Court](#) decided the final two immigration cases for the term, *Mata v. Lynch* and *Kerry v. Din*.

In *Mata*, the court ruled that an appeals court can review the Board of Immigration Appeals' refusal to toll a bid to reopen a removal case based on poor lawyering.

In *Din*, the court upheld the concept of consular nonreviewability by ruling that visa refusals cannot be subjected to court scrutiny and the denial of a visa to a U.S. citizen's spouse does not impact the citizen's own constitutionally protected interest.

Here, attorneys tell Law360 why the decisions are significant.

Kerry v. Din

Avram Morell, [Pryor Cashman LLP](#)



“*Din* is significant because it unfortunately reiterates and reinforces the courts’ unwillingness to second-guess the judgment of consular officers, except in the most limited of circumstances. As a result, an individual who believes her visa application was wrongly denied — even when the error is blatant — has no recourse other than to reapply to the same consular unit that initially denied the application. Also, this case is another example of 'bad facts making bad law.' We may understand a broad application of the doctrine of 'consular nonreviewability' in a fact pattern, such as this one, which potentially raises national security concerns. But many erroneous visa denials are based on an incorrect reading or application of the law and involve individuals who pose no harm to the United States or its citizens. Those people’s chances of getting a court to consider the appropriateness of a visa denial just got smaller.”

Yesenia Acosta, Law Offices of Scott Warmuth



“The debate over the treatment of denials involving the Department of State and consular officers will likely be up for review in the coming future. With the wide attention and pro-immigrant activism that has gained momentum through social media and other outlets, these decisions will reach a greater audience and hopefully there will be some agreement as to how to narrow the scope of the claimed plenary power justification. Many U.S. citizens have had consular applications for loved ones denied without an explanation of the legal and factual basis for the decision, and left without further recourse. Even clearly explaining the legal/factual basis used would help U.S. citizens reapply and give them a chance at submitting an application that adequately addresses the denial grounds, if they choose to reapply (as opposed to appealing).”

Alberto P. Cardenas Jr., [Vinson & Elkins LLP](#)



“The court's decision in *Kerry v. Din* found that the U.S. Constitution does not require the government to provide any further reasoning for denying the spouse's visa application. The effect of today's narrow ruling allowed a U.S. citizen to be permanently separated from her spouse given allegations that her Afghani husband had been involved in supporting terrorism. The ruling affirms that our government has discretion, may be vague with their allegation, and is under no

obligation to reveal the basis of a visa denial. The sad impact of the ruling is the approval the court has provided allowing the government to shroud their decisions in darkness and secrecy, which is the opposite of the public's desire for transparency and accountability."

Maria del Carmen Ramos, [Shumaker Loop & Kendrick LLP](#)



“To some observers, the facts of *Kerry v. Din* — the wife (a naturalized citizen) of a former member of the Taliban regime is precluded from challenging the denial of her husband's visa on terrorism grounds — may make today's outcome more palatable. Unfortunately, however, nothing in today's decision limits it to the facts of this case. Its reach appears much broader than that. The decision surely is a disappointment to immigration practitioners — at least ones who routinely confront mistakes by well-intentioned consular officers — hoping for the end to (or some limit on) the doctrine of consular nonreviewability.”

Ian R. Macdonald, [Greenberg Traurig LLP](#)



“In *Din*, protecting national security trumped the rights of a U.S. citizen to know why her husband's visa was denied, thereby protecting the decisions of consular officers from review and appeal. To balance due process and individual rights against the government's legitimate security

concerns, a middle ground solution may be to create a select group of advocates who can review denials. This advocate body can ensure rights are protected and the government is acting fairly.”

Angelo Paparelli, [Seyfarth Shaw LLP](#)



“The plurality decision of Justice Scalia should be viewed as a very limited take on the meaning of the Due Process Clause as it existed when the Constitution was signed. The decision does not establish that consular officers’ visa decisions are immune from judicial review. Indeed, the case suggests that consular decisions are reviewable on constitutional grounds, but that the amount of process that is due is very minimal if a refusal is based on the terrorism bar to admissibility.”

Amy L. Peck, [Jackson Lewis PC](#)



“The Din case demonstrates the tension between national security and constitutional rights. Ultimately the court continues the long line of Supreme Court cases that uphold the right of the State Department to deny a visa without explaining the reasoning. In effect, the Department of State becomes the judge and the jury because there are few ways to challenge the decision, even if it is believed to be incorrect.”

Karen-Lee Pollak, [Bell Nunnally & Martin LLP](#)



“The court in this case had the opportunity to narrow the doctrine of consular nonreviewability. It is unfortunate that the court did not find that judicial review of visa denials — even if limited in scope — is justified. *Kerry v. Din* could have had major practical significance.”

Ted Ruthizer, [Kramer Levin Naftalis & Frankel LLP](#)



“Six of the nine justices agree that due process is due to the American citizen whose spouse has been denied an immigrant visa. That is the good news. But where the justices differed is that two of the justices (Kennedy and Alito) joined in the judgment denying the case believing that it was sufficient for the U.S. consul to deny the visa based on a finding involving suspected terrorism. As Justice Breyer pointed out in the dissenting opinion joined by three other justices, this is no more than a mere recitation of the statutory basis for visa refusal without providing any facts on which one could provide a response to such a finding. As a longtime immigration lawyer and professor at Columbia Law School, I know all too well how easy it is for a U.S. consul to deny a visa on the flimsiest of evidence. And when there is no requirement for a consul to provide any details that one could rebut, it ends up with what is known as 'consular absolutism.' *Kerry v. Din* is a very harsh decision that will embolden the State Department, through its oversight of the visa process at all U.S. consulates, to provide little or no information to visa applicants. If it is enough to simply cite a statutory basis for refusal, it will be impossible to contest allegations of which an applicant may be completely unaware. Where is the justice in that?”

Kathleen Walker, Dykema [Cox Smith](#)



“The announcement cobbled together rationales to deny that Ms. Din had suffered any due process violation when the State Department denied her husband, Mr. Berashk, an immigrant visa under 8 USC Section 1182(a)(3)(B). The decision fails to provide judicial accountability to a visa denial when there is no reasonable opportunity for a consular officer to exercise discretion to issue a visa when the individual is interred in a database or watch list relied on for security related assessments. The replacement of consular discretion by databases and watch lists, which are fallible, should not be protected from limited judicial oversight.”

Mata v. Lynch

Alexandre I. Afanassiev, [Quan Law Group PLLC](#)



“I was fortunate to be a co-counsel on the case Mata v. Lynch, though the case was driven by my colleagues from Gonzalez Olivieri LLC. In my opinion this victory for an alien petitioner is significant for two reasons: First, it affirms jurisdiction of the federal courts over decisions of the Board of Immigration Appeals on motions to reopen; and second, it provides aliens with some additional level of protection against ineffective assistance of their counsel. Both are important safeguards of individual’s rights to a due process.”

Yesenia Acosta, Law Offices of Scott Warmuth



“The Fifth Circuit’s actions, in failing to assert jurisdiction where proper, were effectively reprimanded in this case. Equitable tolling based on a missed deadline by an attorney is something that should be examined closely in order to protect the respondent’s rights to have the merits of the case heard. For a multitude of reasons, untimely motions are a part of the cases that must be reviewed, and the reasons for untimely filing should be considered on a case-by-case basis. As a side note, it is also an important time to emphasize to immigrant respondents that they may share in the responsibility when errors occur. They should be in close contact with attorneys and be aware of deadlines in their case, to act as a 'check' in case errors like this occur.”

Alberto P. Cardenas Jr., Vinson & Elkins LLP



“The court’s decision in *Mata v. Lynch* is clearly a notice to the bar — and in particular those of us specializing in immigration law. Immigration lawyers shouldn’t fall asleep at the wheel, particularly in the Fifth Circuit. An immigrant seeking to challenge their pending deportation, has rights, especially when a filing deadline is missed because of a prior lawyer’s incompetence. The court today found that the courts of appeals have the power to decide whether a petitioner facing deportation should nevertheless be allowed to pursue their claim before the federal agency that hears immigration appeals.”

Lucrecia M. Davis, Jackson Lewis PC



“In its ruling in *Reyes Mata v. Lynch*, the Supreme Court makes clear that there is a distinction between an appellate court’s jurisdiction to entertain an appeal and the merits of the appeal. The court held that even if the petitioner was not entitled to relief on its merits, the correct disposition is to take jurisdiction and affirm the BIA’s denial of the motion. The decision makes clear that the courts of appeal have jurisdiction over BIA denials of statutory motions to reopen so long as the immigrant’s claim is construed as such. Although the court did not address the underlying substantive question raised by the appeal, its decision on the jurisdiction question opens the door for immigrants to pursue the merits argument at the appellate level.”

Ian R. Macdonald, Greenberg Traurig LLP



“In *Mata*, the court assessed an extremely technical and important immigration law question, but dodged the tougher question as to whether the 90-day motion to reopen period is subject to equitable tolling. The court’s holding that the Fifth Circuit incorrectly declined to take jurisdiction on the case is a win for immigrants in removal proceedings, particularly those in Mississippi, Texas and Louisiana, who missed a filing deadline because of ineffective assistance of counsel. This opens the floodgates for appeals from impacted immigrants and the Fifth Circuit will likely hold that equitable tolling isn’t permitted.”

Karen-Lee Pollak, Bell Nunnally & Martin LLP



"The court's decision in *Mata v. Lynch* resolves a split in authority, as all other appeals courts have held that appeals courts do have jurisdiction in such situations."

--Editing by Mark Lebetkin.