

New Jersey Law Journal

VOL. CLXXXVII- NO. 6 - INDEX 395

FEBRUARY 5, 2007

ESTABLISHED 1878

Commentary

Way Off the Mark in Denying PTI to Undocumented Aliens

By Mitchell Ignatoff

A recent Appellate Division decision barred admission by undocumented aliens into the pretrial intervention program and, in so doing, ignored state and federal law. The ruling contains no citation to federal immigration law nor to *Caballero v. Martinez*, 186 N.J. 548 (2006), in which the New Jersey Supreme Court held that an undocumented alien's status was irrelevant to a question under state law. While the Appellate Division decision on Jan. 10 in *State v. Liviaz and Claros-Benitez*, A-5136-05, said the prosecutor may consider a person's status as an undocumented alien, it held that PTI could not be denied solely on that basis. That is belied by the basis on which PTI was denied to Dennis Claros-Benitez.

The appeals court noted that the prosecutor "emphasized the length of defendant's illegal stay in this country, his complete failure to gain legal status, his 'working under-the-table,' and his involvement in fraud and subterfuge to remain here."

The emphasis on Benitez's illegal stay and failure to gain legal status is exactly what makes him an undocumented alien. He is being rejected because of his undocumented status. In

addition, lots of people have been paid under the table and accepted into PTI, yet he was rejected.

The opinion does not say what fraud and subterfuge Benitez used to stay in the United States. We do know that he was indicted on charges of forging a vehicle title and obtaining a fake driver's license and other government identification. This, too, is a result of his undocumented status, because undocumented aliens cannot obtain a driver's license. All Benitez wanted to do was own a car and drive.

Being an undocumented alien is not a criminal offense in New Jersey, and it *cannot* be. Consideration of the factors that make Benitez an undocumented alien is legally irrelevant in rejecting, or accepting him, to PTI.

The prosecutor claims that having proper identification is in the interest of our national security. Remember 9/11? Those murderers were here on visas, legally. Ninety-nine percent of undocumented aliens come here to work, to support their families. They have more incentive than citizens to be law-abiding. In addition to facing jail if they commit a crime, they can be deported, even if their spouse or child is a citizen.

The federal government has exclusive jurisdiction over immigration, as

noted in *Hines v. Davidowitz*, 312 U.S. 52 (1941); *De Canas v. Baca*, 424 U.S. 351 (1976); and *Plyler v. Doe*, 457 U.S. 202 (1982). Only the federal government can adopt a statute keeping people in or out of the country. New Jersey has no authority to tell an individual he or she cannot reside in the state. The only crimes the defendant commits by remaining in New Jersey without registering with immigration authorities are federal offenses. And violation of immigration laws cannot be made a state crime. As far as New Jersey is concerned, Benitez has not committed any criminal act by being here.

Other than those statutes focusing on improper entry and failure to register, the immigration laws are civil in nature. The New Jersey Supreme Court has never held that violation of a civil law is a reason to deny admission to PTI. That would be equivalent to denying admission based on failing to pay taxes on time, breaching a contract or causing an accident.

Claros-Benitez has never been charged with, nor convicted of, the federal crime of failing to register. The New Jersey Supreme Court has never denied admission to PTI based on conduct that has not led to a charge or an indictment. And even if an individual had been convicted of failing to register, he or she would still be entitled to PTI because failing to register is not a crime in New Jersey. Moreover, as noted in *State v. McKeon*, 385 N.J. Super. 559 (App. Div., 2006), disparate treatment is not permitted when determining eligibility for PTI. Singling out undocumented aliens is subjecting them to disparate

Ignatoff, a certified criminal trial attorney, heads a firm in Middlesex. He has a similar case pending in the Appellate Division, State v. Rafael Lopez.

treatment, according to *Plyler*.

Since immigration status is now relevant to PTI, the New Jersey Superior Court will have to determine whether an individual is illegal under immigration law. Defense counsel are entitled to subpoena immigration officers and documents. And courts will

have to determine whether a defendant is eligible for asylum or temporary protected status; whether a defendant who is eligible but has not yet applied for either status is legal, and whether granting relief from deportation means that immigration authorities have decided there is no continuing

pattern of antisocial behavior. Yet the Superior Court cannot adjudicate immigration claims, for they are federal matters.

Finally, it is up to the Legislature, not the courts, to decide whether undocumented aliens can be admitted to PTI. ■