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*INS v. Ventura:*

**The Court of Appeals Should Remand to the Board of Immigration Appeals When Deciding an Issue Before the Board Has an Opportunity to Address the Matter**

By: Andrea Tony

The United States Supreme Court held the Court of Appeals for the Ninth Circuit should remand to the Board of Immigration Appeals (“BIA”) when deciding issues the BIA never had an opportunity to address. *INS v. Ventura*, 123 S.Ct. 353 (2002). In so holding, the Court found the court of appeals exceeded its authority when deciding the issue of changed circumstances on its own, instead of remanding the case to Immigration and Naturalization Service. *Id.* at 355-56.

In 1993, Guatemalan citizen Orlando Ventura (“Ventura”) entered the United States illegally. In 1995, the Attorney General began deportation proceedings. Two years later, an immigration judge considered Ventura’s application for asylum and withholding of deportation based upon a fear and threat of persecution “on account of [a] political opinion.” Ventura testified that the Guatemalan military threatened to kill or harm him unless he joined the guerilla army.

The immigration judge denied Ventura asylum because he failed to show the guerillas’ were interested in him “on account of his political opinion.” The BIA, reviewing the matter *de novo*, agreed Ventura failed to prove the statutory

requirement that he faced persecution “on account of” a qualifying ground. The Court of Appeals for the Ninth Circuit reversed and held the evidence in the record failed to show sufficient change in Guatemala. The Supreme Court granted certiorari to decide whether the court of appeals exceeded its authority when deciding on its own the “changed circumstances” issue.

The Supreme Court began its analysis by outlining the law that allows INS to make the basic asylum eligibility decision in this case. *Id.* at 355. The Court noted “a judicial judgment cannot be made to do service for an administrative judgment.” *Id.* at 355 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). Similarly, an appellate court cannot interfere with the subject matter Congress has assigned exclusively to an administrative agency. *Id.* at 355. Generally, an appellate court lacks the authority to perform a *de novo* inquiry into an issue and to reach its own conclusions based on their inquiry. *Ventura*, 123 S.Ct. at 355 (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Instead, the Court stated that an appellate court should remand to the agency for additional investigation or explanation. *Id.* at 355.

Next, the Court explained the court of appeals should generally remand a case back to an agency for a decision on an issue that statutes placed in agency hands. *Id.* In the instant case, the BIA had not ruled on the “changed circumstances” issue. *Id.* The agency encompasses a high level of expertise in evaluating the matter and can make an initial determination, thus providing an analysis to help a court determine if the agency overstepped its boundaries. *Id.* at 355-56. The Court further noted that the court of appeals committed a clear error by not only disregarding the agency’s role, but also by creating independent, “potentially far-reaching legal precedence about the significance of political change in Guatemala, a highly complex and sensitive matter.” *Id.* at 356.

Subsequently, the Court identified two problems with the court of appeals’ reliance on the outdated basic record evidence. *Ventura*, 123 U.S. at 356. First, the 1997 State Department report regarding Guatemala proved, at best, ambiguous about the circumstances. *Id.* But, the Court pointed out that the majority of the report stated relations between the Guatemalan Government and the guerrillas had changed consid-

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erably, including a signed peace agreement between the two parties calling for a cease fire. *Id.*

The Court further noted the court of appeals erroneously relied on parts of the report that indicate even after the cease-fire, the guerillas continued to employ death threats, and crime and violence seemed to be higher than previous years. *Id.* However, the court of appeals failed to consider a section of the report that added, "only party leaders and high profile activists generally would be subject to harassment and only in their home communities." *Id.*

Second, the court of appeals failed to consider that a decision to remand the case would allow for the presentation of further evidence on the current political circumstances in Guatemala, since the five-year-old report in evidence seemed obsolete. *Id.*

The decision in *Ventura* demonstrates the Court's reluctance to allow appellate courts to decide issues of first impression when administrative law requires otherwise. This case reinforces the great deference the Court gives agency decisions with a sharp focus on the recent circumstances. The climate of United States Immigration law changed drastically after September 11, 2001. Immigration lawyers seeking asylum for their clients in the United States must be more aware of the potential for procedural discrepancies when advising their clients about potential options.

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