Immigration Court: DOJ

Case: *Matter of Castro-Tum* **Date:** May 17, 2018

Adjudicated by: A.G. Sessions

Opinion: Sessions

Tags: Administrative Closure, BIA, Attorney General, Immigration Judges, removal *in absentia*, authority, continuances

Question Presented: Do immigration judges and the Board have the general authority to suspend indefinitely immigration proceedings by administrative closure?

Holdings: Immigration judges do not have the authority to suspend indefinitely immigration proceedings by administrative closure.

- Administrative closure can only be activated if a regulation or precedent allows it.
- If an immigration judge exercised unauthorized administrative closure, either party can move to recalendar the case.
- BTW, I just overruled *Matter of Avetisyan* [25 I&N Dec. 688 (BIA 2012)] and *Matter of W-Y-U-* [27 I&N Dec. 17 (BIA 2017)].

Rationale:

- Administrative closure was never authorized by Congress in a statute.
- DOJ regulations only permit it rarely.
- "The A.G. has never delegated the general authority, and I decline to do so now." (274)
- Sure, the regs say judges can take "appropriate and necessary actions," but then they list all the things they can do: administer oaths, receive evidence, examine witnesses, issue subpoenas, all very timely and impartial. BUT THE REGS DO NOT GRANT EITHER IMM JUDGES OR THE BIA THE DISCRETION OF ADMIN CLOSURE.
- Administrative closure doesn't make for a timely case.
- "These instances of limited, express authorization [to administratively close cases] reinforce the conclusion that no broad delegation of authority exists." (288)

Facts: Illegal entry as an unaccompanied minor in 2014, detained immediately. Served with a NTA and released to relative. Failed to appear for hearing dates.

History of the Case:

- After multiple failures to appear & continuances, the imm. judge ordered the case administratively closed (not a reliable address for service by DHS) over DHS's objection.
- Appeal to BIA: vacated imm. judge's closure and remanded to proceed with removal in absentia.

- This is "one of nearly 200 decisions between April 2017 and December 2017 in which an immigration judge either ordered administrative closure or refused to recalendar an administratively closed case over DHS's objection." (274)

Appeals to Statute & Precedent:

- ***Matter of W-Y-U-* [27 I&N Dec. 17 (BIA 2017)]:** Administrative closure is "a docket management tool used to temporarily pause removal proceedings" (18). Clarifies *Avetisyan*—deciding factor for admin closure should be whether the **opposing** party has provided a persuasive reason to keep the case open.
- ***Matter of Avetisyan* [25 I&N Dec. 688 (BIA 2012)]:** Administrative closure removes a case from the active calendar/docket. Possible to do even if over one party's objection.
- **8 C.F.R. §§1003.10(b) & 1240.1(a)(1)(iv), (c):** Grants imm. judges power to regulate course of hearing and to take necessary and appropriate action. (*Avetisyan* based on these regs.)
- ***Matter of Lopez-Barrios* [20 I&N Dec. 203 (BIA 1990)]:** Admin. Closure only when both parties supported the request; assumed that imm. judges & Board possessed this general authority.
- ***Baez-Sanchez v. Sessions* [872 F.3d 854 (7th Cir. 2017)]:** 7th Circuit interpreted above statute very broadly as to imm judges' authority.
- **8 C.F.R. §1240.1(a)-(c):** jurisdiction of immigration judges in removal proceedings. (Specified actions that do not include "the authority to make procedural rulings within the proceeding, such as the granting of admin closure." (285))
- **8 U.S.C. §1229a(b)(5):** imm judge has to initiate removal in absentia if respondent fails to appear for hearing.

Relevant U.S./Immigration law History:

- "In recent years, immigration judges and the Board have increasingly ordered administrative closure to remove a large number of cases from their dockets." (272)
- "…the INA vests the A.G. with the supervision of immigration proceedings." (283)
    - IOW, imm judges and DHS work for A.G.
- "Since **1980**, immigration judges have recalendared less than a third of administratively closed cases." (273)
- **1984**—Chief Imm. Judge advised admin closure when repeated failure to appear.
- **1988-2012**: admin closure only when both parties supported the request.
- **1999**: DOJ direction re. admin closure: for certain Guatemalan & Salvadoran nationals
- **1998-2003:** DOJ regs requiring admin closure "in certain cases where aliens pursue statutory procedures to avoid removal." (277) (e.g., Nicaraguan & Cuban nationals; Haitians; Vietnamese, Cambodians, Laotians)
- **2000:** Victims of Trafficking and Violence Prevention Act: T nonimmigrant relief.

- **2000:** Legal Immigration Family Equity (LIFE) Act: "authorized the spouses and children of permanent residents to live and work in the U. S. while waiting to obtain 'V nonimmigrant' status." (277)
- **2001:** ^^^ eligible aliens may request admin closure in order to pursue V nonimm status.
- **2002:** VTVPA eligible aliens may request admin closure to pursue T visa
- **2012** (*Avetisyan*)—consider six factors upon motion for admin. Closure over one party's objection:
  (1) Reason admin closure is sought
  (2) Basis for opposition
  (3) Likelihood that respondent will succeed to get relief outside removal proceedings
  (4) Anticipated duration of closure
  (5) In what way any party is contributing to current or anticipated delay
  (6) Ultimate outcome of removal proceedings (see p.696)
- **2011-2017**—"DHS used admin closure as a way to decline to prosecute low priority cases without formally terminating them." (276)
- **Feb. 20, 2017**—DHS memorandum: "[DHS] no longer will exempt classes or categories of removable aliens from potential enforcement." (276)

Quotes:

- "Although described as a temporary suspension, administrative closure is effectively permanent in most instances." (272)
- "the Board is 'a regulatory creature of the A.G., to which he has delegated much of his authority under the applicable statutes.'" (283, q. *Doherty* [12 Op. O.L.C. 1 (1988)])
- Re. *Baez-Sanchez:* "That interpretation is inconsistent with the regulatory text, which limits immigration judges to authorities that are 'appropriate and necessary' to resolving cases in a manner consistent with existing statutes and regulations, rather than authorizing novel tools for adjudication." (284n6) (Not to mention, why bother with specific regs re. things like continuances and people from certain countries, if they already have broad power to do all things?)
- "Grants of general authority to take measures 'appropriate and necessary for the disposition of such cases' would not ordinarily include the authority to suspend such cases indefinitely. Admin closure in fact is the antithesis of a final disposition." (285)
- "To the extent that past memoranda have mentioned administrative closure, they have simply assumed—based on Board precedent—that the authority exists." (286)
- "In the course of reviewing Board decisions involving admin closure, federal courts have assumed that immigration judges and the Board have such authority." (287)
- "…no federal court has analyzed the regulations in detail, much less held that they unambiguously confer such authority." (287)
- "There would be no need to provide that immigration judges 'may' administratively close specific cases if they already possessed the discretionary power to do so." (288)

- "I am aware of no other evidence that previous AGs delegated the general authority to administratively close cases, and the Board has never cited any such delegation. To the extent that any AG could be viewed as having made such a delegation, I hereby exercise my discretion to revoke it because the practice of admin closure thwarts the efficient and even-handed resolution of imm proceedings." (289)
- Re. federal courts' inherent authority to administratively close cases: "But immigration judges and the Board have no such inherent authority. They act on behalf of the AG in adjudicating immigration cases, and can exercise only the specific powers that statutes or the Attorney General delegate." (292)
- "Cases that should not go forward should be terminated (either with or without prejudice), or dismissed, provided they meet the relevant legal standard. Unlike admin closure, termination and dismissal ensure finality, cutting down on the number of cases orphaned within the imm courts." (292)
- BTW, continuances are the bomb, and you should use them until I tell you you can't. (293n13)

Commentary:

- Problems with administrative closure:
  - Ends up being permanent rather than temporary pause in a case
  - When a case is dropped from the docket, it is no longer tracked or counted as active (when tallying backlogged cases)
  - Difficult to recalendar bcz DHS "may not know when the reason for the suspension (such as the pendency of a collateral proceeding) has been resolved." (273)
  - BIA has imposed burden of persuasion on the movant to recalendar (i.e., DHS)
- A.G. can by law oversee the immigration law either by rulemaking or by adjudication. His determinations are controlling. "Thus, this published decision is binding on the Board and will overrule any Board decision with which it is inconsistent." (282)
- BIA has "discretion to take actions consistent with reviewing appeals such as deciding questions not expressly raised, accepting untimely briefs, and correcting obvious omissions in an immigration judge's order." (285)
- Roles of Chief Immigration Judge and the Chairman of the Board: authority to manage dockets, including setting priorities and time frames. But A.G. doesn't see that this grants authority for admin closure.
- **Canons of Construction:** if your interpretation means some part of the statute is now superfluous, your interp is wrong. (e.g., if you say judges have broad authority to close cases, then why the specific regs about closing cases for certain alien petitioners?)