**Fourth Circuit Court**

**Case:** *Zuniga Romero v. Barr*, No. 18-1850 (4th Cir. 8.29.19)
**Date:** August 29, 2019

**Adjudicated by:** Agee, Floyd, Thacker **Opinion:** Agee (unanimous)

**Tags:** Immigration, BIA, IJs, Attorney General, *Castro-Tum*, Administrative Closure

**Question Presented:** Do IJs and BIA members have the authority to administratively close cases?

**Holdings:**

- Yes, IJs and BIA members DO have general authority to act appropriately for the administration of cases, which extends to utilizing administrative closure.
- *Castro-Tum* does not merit either *Auer* or *Skidmore* deference.
- Zuniga Romero's case is vacated and remanded for a decision in keeping with this one.

**Rationale:**

- Administrative closure is included in the general authority granted in 8 C.F.R. § 1003.10(b) (re. IJs) and 8 C.F.R. § 1003.1(d)(1)(ii) (re. BIA members) to take any action that is appropriate and necessary for such cases.
- The IJs and BIA have done this consistently since 1980, and it's been affirmed in lots of opinions.
- The regulations are not ambiguous, and even if they were, the A.G.'s decision is so out of keeping with past practice as to be a "sudden surprise" procedurally for litigants.

**Procedural History:**

- **2013:** Removal proceedings against Zuniga Romero
- **IJ:** Respondent accepted voluntary departure.
- **Reopening:** Respondent is beneficiary of LPR wife's I-130
- **Motion for Admin Closure:** Wife now naturalized, respondent wants to file I-601A for a provisional unlawful presence waiver. Removal proceedings have to be administratively closed for this to happen.
- **IJ:** denied admin closure
- **Appeal to BIA:** sustained appeal, administratively closed case.
- **2017: DHS—Motion to Reconsider**
- **May 2018: A.G.'s *Castro-Tum*** outlaws administrative closure
- **June 2018: BIA** grants DHS motion, dismissed respondent's appeal & ordered him deported.
- **Petition to 4th Circuit**

**Appeals to Statute & Precedent:**

- ***Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012):** Administrative closure is necessary for the efficient processing of this case. Six-factor test for applying admin closure.
- ***Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009):** Administrative closure is necessary for the processing of a visa application.
- ***Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017):** Purpose of & reasons for administrative closure
- ***In re. Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996):** affirmed administrative closure
- ***Gonzalez-Caraveo v. Sessions*, 882 F.3d 885 (9th Cir. 2018):** cites statutes at 8 C.F.R. § 1003 as authority for admin closure.
- ***Kisor v. Wilkie*, 139 S. Ct. 2400 (2019):** *Auer* deference does not apply when a new interpretation creates an unfair surprise to regulated parties.
- ***Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944):** in absence of *Auer* criteria, deference is merited if agency's interpretation is well-thought-through and persuasive.
- ***Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012):** DOL interpretation of a regulation that departed abruptly from longstanding previous practice was not afforded deference by the Court.

**Legal Background:**

- "By administratively closing a case, an IJ or the BIA 'temporarily pause[s] removal proceedings' and places the case on hold, generally because there is an alternate form of case resolution pending, or because the case may be affected by events outside of the control of either party or that may not occur for some time. *Matter of W-Y-U-*, 27 I&N Dec. 17, 18 (BIA 2017)." *Zuniga Romero v. Barr* at 5.

- "General administrative closure is not specifically authorized by the INA or the regulations governing IJs or the BIA." *Zuniga Romero v. Barr* at 6.

- Administrative closure is specifically authorized by statute in these cases:
  - **8 C.F.R. § 1214.2(a):** T-immigrant status
  - **8 C.F.R. § 1214.3:** V-immigrant status
  - **8 C.F.R. § 1234.13(d)(3)(i):** in certain cases re. nationals of Cuba & Nicaragua who are eligible for LPR status
  - **8 C.F.R. § 1245.15(p)(4)(i):** Haitian nationals " "
  - **8 C.F.R. § 1245.21(c):** similar for nationals of Vietnam, Cambodia, & Laos

- "the BIA has referenced two regulations that confer broad powers to IJs and the BIA to manage their dockets as the authority for administrative closure." (*Zuniga Romero v. Barr* at 6-7.)
  - **8 C.F.R. § 1003.10(b):** powers & duties of IJs (see attached for full text)
  - **8 C.F.R. § 1003.1(d)(1)(ii):** powers of BIA members (" " ")

- *Matter of Avetisyan* (BIA 2012):
  - "[d]uring the course of proceedings, an Immigration Judge or the Board may find it necessary or, in the interests of justice and fairness to the parties, prudent to defer further action for some period of time." *Matter of Avetisyan*, 25 I&N Dec. 688, 691 (BIA 2012).

- "In this vein, the BIA has issued numerous decisions authorizing IJs to administratively close cases for a variety of reasons related to conservation of court resources." *Zuniga Romero v. Barr* at 8-9.

- *Matter of Castro-Tum* (A.G. 2018):
  - Those statutes don't confer the power to administratively close cases.
  - And anyway, administrative closure isn't timely or efficient.
  - So IJs & BIA can only administratively close if specifically authorized by statute.
  - "The Attorney General concluded that to the extent any existing regulations delegated the general authority to administratively close cases, he was exercising his 'discretion to revoke it because the practice of administrative closure thwarts the efficient and even-handed resolution of immigration proceedings.'" *Zuniga Romero v. Barr* at 10; *see Matter of Castro-Tum* at 288 n.10.

- Matters of Deference to BIA's Interpretation:
  - No *Auer* deference required, because the regulations are not ambiguous.
    - Even if the regulations *were* ambiguous, the agency's interpretation would have to be
      - Reasonable and
      - In keeping with the character and context of the agency's interpretation in the past
    - "Finally—and most important for this case—*Auer* deference does not apply 'to a new interpretation . . . that creates 'unfair surprise' to regulated parties.'" *Zuniga Romero v. Barr* at 12; *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

**Analysis of *Castro-Tum*:**

- "…we conclude that the plain language of 8 C.F.R. § 1003.10(b) and 8 C.F.R. § 1003.1(d)(1)(ii) unambiguously confers upon IJs and the BIA the general authority to administratively close cases such that an *Auer* deference assessment is not warranted. But even if the regulations were ambiguous, we alternatively conclude that deference under either *Auer* or *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), is not merited." *Zuniga Romero v. Barr* at 13.

- Do these regulations confer authority on IJs and the Board to administratively close cases?
    - Gov't says no.
    - "But Romero points to the expansive language in those regulations as conferring such authority."
    - **8 C.F.R. § 1003.10(b):** "In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."
    - **8 C.F.R. § 1003.1(d)(1)(ii):** "Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case."

- "…we clearly discern from the text that the authority of IJs and the BIA to administratively close cases is conferred by the plain language" of these statutes. *Zuniga Romero v. Barr* at 14.
    - "any action" includes administrative closure: "this would plainly include docket management actions such as administrative closure, which often facilitate, as discussed above and below, case resolution." *Zuniga Romero v. Barr* at 14-15.

- Is administrative closure ever "appropriate and necessary"?
    - Yes: continuances are not always the most appropriate mechanism, because some delays cannot be resolved by the action of one of the parties (as would be expected with a short continuance). Where an indefinite delay can only be resolved by actions outside the parties' control, administrative closure is the most appropriate path.
    - **"…expecting IJs and the BIA to employ continuances in the stead of administrative closure would further remove the discretion of these adjudicators to fashion the most flexible and appropriate resolution of a case."** *Zuniga Romero v. Barr* at 15 n.12.

    - *"Avetisyan* demonstrates how suspension of the case may in fact expedite and result in a final disposition." *Zuniga Romero v. Barr* at 15 n.13.

- "In sum, these regulations unambiguously confer upon IJs and the BIA the general authority to administratively close cases. Accordingly, there is no *Auer* deference analysis to be conducted. ***Castro-Tum*'s interpretation of these regulations is therefore in error.**" *Zuniga Romero v. Barr* at 18.

- Even if the regulations *were* ambiguous, *Castro-Tum* represents such a departure from the A.G.'s interpretation that it amounts to unfair surprise:
    - "the Attorney General's reading of the regulations does not warrant deference because it amounts to an 'unfair surprise' disrupting the regulated parties' expectations." *Zuniga Romero v. Barr* at 19 (quoting *Kisor*, 139 S. Ct. at 2417-18, quoting in turn *Long Island Care at Home, Ltd. V. Coke*, 551 U.S. 158, 170 (2007)).

- **"…the new interpretation in *Castro-Tum* (1) breaks with decades of the agency's use and acceptance of administrative closure and (2) fails to give 'fair warning' to the regulated parties of a change in a longstanding procedure."** *Zuniga Romero v. Barr* at 21.

- "…administrative closure has been a procedural mechanism employed by IJs and the BIA since the late 1980s and consistently reaffirmed—even if its precise contours have changed—through the BIA's precedential decisions." *Zuniga Romero v. Barr* at 22.

- "Accordingly, numerous petitioners have relied on this long-established procedural mechanism to proceed through the immigration process. To suddenly change this interpretation of the regulation undermines the significant reliance interests such petitioners have developed. . . . **[S]uch a sudden shift in longstanding agency interpretation frustrates mechanisms for predictability that are supposed to be baked into the administrative process.**" *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012).

- *Castro-Tum* is "internally inconsistent":
    - "…it would in fact serve to lengthen and delay many of these proceedings by: (1) depriving IJs and the BIA of flexible docketing measures sometimes required for adjudication of an immigration proceeding, as illustrated by *Avetisyan*, and (2) leading to the reopening of over 330,000 cases upon the motion of either party, straining the burden on immigration courts that *Castro-Tum* purports to alleviate." *Zuniga Romero v. Barr* at 22.

- *Skidmore* deference is also unwarranted:
    - "And here, a court reviewing *Castro-Tum* for *Skidmore* deference would not be persuaded to adopt the agency's own interpretation of its regulation for substantially the same reasons it is not entitled to *Auer* deference: because it represents a stark departure, without notice, from long-used practice and thereby cannot be deemed consistent with earlier and later pronouncements." *Zuniga Romero v. Barr* at 23.