Third Circuit Court

Case: *Osorio Martinez v. A.G.*, No. 17-2159 (3d Cir. 2018) (Precedential) **Date:** June 18, 2018

Panel: Ambro, Krause, Scirica **Opinion:** Krause

Tags: Immigration, SIJS, habeas corpus, jurisdiction, expedited removal

Question(s) Presented:

1. "Does the jurisdiction-stripping provision of the INA operate as an unconstitutional suspension of the writ of habeas corpus as applied to SIJ designees seeking judicial review of orders of expedited removal?" *4
2. Do petitioners with SIJ status have sufficient ties to the United States to merit jurisdictional review by the federal court?

Holdings:

1. "We hold that it does. . . . By virtue of satisfying the eligibility criteria for SIJ status and being accorded by Congress the statutory and due process rights that derive from it, Petitioners here, unlike the petitioners in *Castro*, meet that standard and therefore may enforce their rights under the Suspension Clause." *5
2. District Court's denial of injunctive relief is reversed.

Rationale:

- "As we explained in *Castro*, only aliens who have developed sufficient connections to this country may invoke our Constitution's protections." *5
- No judicial review available under the INA (per *Castro*); but Constitutional review is possible now that they have SIJ status, which involves ties to the U.S.

Facts & Procedural History:

- (*5-6) Two families, one from El Salvador & one from Honduras, "fled physical and sexual violence perpetrated by gangs in their home countries" and entered U.S. in 2015. CBP detained them within four miles of the border almost immediately. They were ordered expeditiously removed. CFI denied and affirmed by an IJ. Detained in Berks County, PA.
- (*6) These families and 25 additional families sought habeas relief from EDPA. Denied for lack of subject-matter JX.
- (*6-7) Same on appeal to 3d Cir. (*Castro*). Very limited review (did officer issue paper, was person the same person on the paper) and habeas unavailable bcz they arrived too recently.
- (*7-8) Kids applied for SIJ status in Berks County & were approved in 2016. They were wait-listed for AOS visas. "Notwithstanding these developments, however, DHS continued to detain the children and their mothers and to seek their expedited removal—removal to the very countries to which USCIS and the Berks County Court of Common Pleas both found, as part of the SIJ determination, it would not be in the children's best interest to return." (*8)

- (*8) "In view of the children's changed status, Petitioners filed a new class action complaint [in EDPA] seeking a writ of habeas corpus or injunction to prevent the Government from executing the removal orders against them and to require their release from immigration detention pursuant to these orders, on the ground that their SIJ classification prohibited their expedited removal and continued detention."
- (*9) District Court initially granted, then dissolved a TRO for lack of subject-matter jx to issue a writ of habeas corpus.
- (*10) Petitioners released conditionally from detention, appeal filed with 3d Cir.

Petitioner's Arguments:

- "Because the children have now attained this [SIJ] status, they contend they are exempted from the application of § 1252(e)(2) and the courts retain statutory jurisdiction to review their expedited removal orders." *12-13

Appeals to Statute & Precedent:

- **U.S. Constitution. Ar. I, § 9, cl.2:** "The Suspension Clause forbids suspension of the writ of habeas corpus 'unless when in Cases of Rebellion or Invasion the public Safety may require it.'" *Osorio Martinez* at *18.
- **8 U.S.C. § 1101(a)(27)(J)(iii):** describing SIJ as a "status"
- **8 C.F.R. § 204.11(b):** describing SIJ as a "status"
- **8 U.S.C. § 1225(b)(2)(A):** entering alien not present for past 2 years, EWI will be placed in **expedited removal proceedings**. No procedural protections afforded these noncitizens, and INA "tightly constrains judicial review of expedited removal orders." *Osorio Martinez* at *14.
- **8 U.S.C. § 1225(b)(2)(A):** entering alien must be placed in **standard removal proceedings** if no valid entry documents.
- **8 U.S.C. § 1252(e)(2):** judicial review for habeas proceedings in expedited removal cases is limited to determinations of whether the petitioner is an alien, whether the petitioner was ordered removed, and whether the petitioner has refugee or asylee status.
- **8 U.S.C. § 1255(a):** describing AOS
- **8 U.S.C. § 1255(h):** Listing rights of SIJ status. SIJ designees are "deemed . . . to have been paroled into the United States." (1) SIJs are exempted from "a set of generally applicable grounds of inadmissibility," such as the lack of valid entry documents.
- **8 C.F.R. §205.2:** SIJ status may not be revoked except on notice, & SHS must find "good and sufficient cause" for revocation, & SIJ designee must be given opportunity to oppose revocation with evidence.
- ***Castro v. DHS*, 835 F.3d 422 (3d Cir. 2016), *cert denied*, 137 S. Ct. 1581 (2017):** same petitioners: at that time, 3d Cir lacked JX to review because they had insufficient ties to the U.S., "because their relationship to the United States amounted only to presence in the country for a few hours before their apprehension by immigration officers." *Osorio Martinez* at *4.
- ***Landon v. Plasencia*, 459 U.S. 21, 32 (1982):** Recent entrants to U.S. don't have constitutional rights regarding their applications for admission. *Osorio Martinez* at *7. ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." *Landon* at 32)

- ***Yeboah v. U.S. Dep't of Justice*, 345 F. 3d 216, 221 (3d Cir. 2003):** describing SIJ as a "special status to remain in the United States."
- ***Serrano-Alberto v. Att'y Gen*., 859 F.3d 208, 211 (3d Cir. 2017):** "[A]liens in immigration proceedings . . . are entitled to due process of law."
- ***Boumediene v. Bush*, 553 U.S. 723 (2008):** provides two-step analysis of a jurisdiction-stripping statute.
- ***U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990):** "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." (quoted in *Osorio Martinez* at 25, quoting *Castro* at 448)
- ***Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011):** SIJ status demonstrates "a congressional intent to assist a limited group of abused children to remain safely in the country with a means to apply for LPR status."
- ***In re Adelina Gonzalez-Morales*, A206 453 127, 2015 WL 4873234, at *1 (BIA July 2, 2015):** IJ should continue the proceedings to await adjudication of state dependency petition for SIJ applicant.
- ***Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953):** "[A] lawful permanent resident of the United States . . . physically present there . . . may not be deprived of his life, liberty or property without due process of law."

Relevant U.S. History:

- "The Government's decision to continue seeking removal is particularly noteworthy because, as far as we are aware, until very recently DHS has never attempted to remove SIJ-classified children back to their countries of origin, much less on an expedited basis." *8

- "Congress has set various limits on the number of visas that may be made available, *see* 8 U.S.C. §§ 1151, 1153, resulting in a waiting list when demand for visas exceeds supply, *see* 8 C.F.R. § 245.1(g)(1). The Government represents that the current waiting list for these SIJ designees is backed up more than two years." *8 n.3

- ". . . for certain aliens present in the country, including SIJ designees, Congress has provided for special immigrant classifications, affording them a status and statutory protections that may not be revoked without specified process, including judicial review." *12

- "Congress established SIJ status in 1990 . . . and it entrusted the review of SIJ petitions to USCIS, a component of DHS." *15
  - Deemed paroled
  - Exempted from grounds of inadmissibility, such as not having valid entry documents. *16
  - Granted forms of support, "such as access to federally funded educational programming and preferential status when seeking employment-based visas." *16
  - Status may not be revoked except on notice & after gov't follows special step, including letting the SIJ designee present evidence opposing the revocation. *16
  - Right to appeal adverse ruling, first to Associate Commissioner for Examinations & then to federal courts. *16

- *Boumediene* detainees at Guantanamo Bay were assessed re:
  - "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made"
  - "the nature of the sites where apprehension and then detention took place"
  - "the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Boumediene*, 553 U.S. at 766. – *Osorio Martinez* at 22 n.10

  - "Congress expressly exempted only SIJ designees and aliens who served honorably in active duty in the United States military from § 1255(a)'s general requirement that aliens be 'admitted or paroled into the United States' before applying for adjustment of status, *id.* 1255(h)(1), 1255(g)—a significant benefit that supports the substantial legal relationship of SIJ designees with the United States and, hence, their ability to invoke the Suspension Clause and obtain judicial review." *32 n.14

  - "Moreover, while the creation of statutory rights associated with a given immigration status falls exclusively within the purview of Congress, it bears mention that the Executive to this point has consistently respected those rights and allowed SIJ designees to remain in the United States pending adjustment of status. Although the INA allows the DHS to expeditiously remove certain aliens apprehended up to two years after entering the United States and who were encountered anywhere within United States territory, *see* 8 U.S.C. § 1225(b)(1), it apparently has not, until recently sought even standard removal, much less expedited removal, of SIJ designees while their applications for adjustment of status were pending." *36

  - "[t]he fact that the Government has not—until now—sought to remove SIJ applicants, much less designees, undermines any urgency surrounding Petitioners' removal." *49

Discussion:

- "The protections afforded to children with SIJ status include an array of statutory and regulatory rights and safeguards, such as eligibility for application of adjustment of status to that of lawful permanent residents (LPR), exemption from various grounds of inadmissibility, and robust procedural protections to ensure their status is not revoked without good cause." *4

- ". . . while we agree with the Government that *Castro* forecloses our jurisdiction under § 1252(e)(2), we conclude that *Castro* supports a different result as to the constitutionality of that jurisdiction-stripping provision as applied to SIJ designees." * 11

- "While the Government asserts that SIJ classification 'does not itself alter Appellants' legal status,' Gov't Br. 6, this argument is belied by the text of the INA, which explicitly designates SIJ as a 'status' that affords a host of legal rights and protections." *11-12 n.7

- ". . . the INA tightly constrains judicial review of expedited removal orders, stripping federal courts of jurisdiction to review such orders except on three narrow grounds . . ." (see above, **8 U.S.C. § 1252(e)(2)**) *14

Discussion, cont'd:

- "As our cases make clear, while discretionary decisions of the Attorney General are not subject to judicial review, federal courts may review under the Administrative Procedure Act, 5 U.S.C. s 702, whether the agency has comported with its own regulations and policies identifying the factors it must consider and the process it must accord." 17 n.8

- Legal process: two-step analysis from *Boumediene v. Bush* to determine whether a jx-stripping statute violates the Suspension Clause:
  - "We first determine 'whether a given habeas petitioner is prohibited from invoking the Suspension Clause due to some attribute of the petitioner or to the circumstances surrounding his arrest or detention.' *Castro*, 835 F.3d at 445 (citing *Boumediene*, 553 U.S. at 739)." *21-22
  - "Then, if the petitioner is not prohibited from invoking the Suspension Clause, we 'turn to the question whether the substitute for habeas is adequate and effective to test the legality of the petitioner's detention (or removal).' *Id.* at 445 (citing *Boumediene*, 553 U.S. at 739)." *22

- "Like the 'status of the detainee[s]' at Guantanamo Bay, Petitioners' 'status' as SIJ designees militates against denial of the writ." *22 n.10.

- "*Castro* anticipated circumstances like those with which we are presented today, and it foreshadowed the outcome: Because SIJ status reflects Petitioners' significant ties to this country and Congress's determination that such aliens should be accorded important statutory and procedural protections, Petitioners are entitled to invoke the Suspension Clause and petition the federal courts for a writ of habeas corpus." *23

- "We further conclude that because the expedited removal regime does not provide an adequate substitute process, the INA's jurisdiction-stripping provisions effect an unconstitutional suspension of the writ as applied to Petitioners." *23

- "Recognizing that 'initial admission' . . . can be read to mean 'initial entry,' we decided that aliens 'apprehended within hours of surreptitiously entering the United States' are properly treated as aliens 'seeking initial admission' and that they therefore 'cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them.'" *24-25 (quoting *Castro* at 445-46)

- "But our reasoning in *Castro* leads to the opposite conclusion here, because, as SIJ designees, Petitioners are readily distinguished from aliens 'on the threshold of entry' who clearly lack constitutional due process protections concerning their application for admission." *25 (internal quotation marks omitted)

- From *Landon v. Placensia*: "once an alien gains admission to our country *and begins to develop the ties that go with permanent residence* his constitutional status changes accordingly." (459 U.S. at 32, emphasis added by *Castro* at 448)

Discussion, cont'd:

- "In contrast, Petitioners here have developed the 'substantial connections with this country,' *Verdugo-Urquidez*, 494 U.S. at 271, that 'go with permanent residence,' *Landon*, 459 U.S. at 32." * 26

- **Substantial ties because:**
  - "(1) these children have satisfied rigorous eligibility criteria for SIJ status, denoting them as wards of the state with obvious implications for their relationship to the United States;
  - "(2) Congress accorded these children a range of statutory and procedural protections that establish a substantial legal relationship with the United States;
  - "(3) with their eligibility for application for permanent residence assured and their applications awaiting only the availability of visas (a development that is imminent by the Government's calculation) and the approval of the Attorney General, these children have more than 'beg[un] to develop the ties that go with permanent residence,' . . . and
  - "(4) in contrast with the circumstances in *Castro*, recognition of SIJ designees' connection to the United States is consistent with the exercise of Congress's plenary power." *26

- "SIJ status also reflects the determination of Congress to accord those abused, neglected, and abandoned children a legal relationship with the United States and to ensure they are not stripped of the opportunity to retain and deepen that relationship without due process. *See Garcia*, 659 F.3d at 1271 (describing SIJ status as a 'special recognition and opportunity to make contacts in this country')." *31

- "Congress also enlarged the chance that Petitioners would be successful in their applications for adjustment by exempting them from a host of grounds that would otherwise render them inadmissible—including being found to be a 'public charge,' lacking a 'valid entry document,' or having 'misrepresented a material fact'—while seeking admission into the United States" *31-32

- "In addition, Congress also afforded these aliens a host of procedural rights designed to sustain their relationship to the United States and to ensure they would not be stripped of SIJ protections without due process." *33

- "Petitioners' **expedited removal** would be based on a ground for inadmissibility—lack of valid immigration documentation, *see* U.S.C. § 1182(a)(7)(A)—from which Petitioners are expressly exempted by virtue of their SIJ status, *see id.* §1255(h)(2)(A). In short, expedited removal would render SIJ status a nullity." *35

- " . . . if a 'SIJ is in **removal proceedings**, the immigration court must terminate [removal] proceedings before USCIS can adjudicate the adjustment application.' 6 USCIS Policy Manual, pt. J., ch. 4 n.2 (Mar 21, 2018)." *37

- "Similarly, the BIA has made clear its conclusion that even mere applicants for SIJ status—let alone children who have already received SIJ status—should not be removed from the country, as it has repeatedly held that '[a]bsent evidence of an alien's ineligibility for SIJ status, an Immigration Judge

should, as a general practice, continue proceedings to await adjudication of a pending state dependency petition.' *In re. Adelina Gonzalez-Morales*, A206 453 127, 2015 WL 4873234, at *1 (BIA July 2, 2015)." * 37

- "The Chief Immigration Judge has likewise instructed IJs that 'if an unaccompanied child is applying for Special Immigrant Juvenile . . . status, the case must be administratively closed or reset for that process to occur in the appropriate state or juvenile court." *37

- "Because of the rights and benefits they have been accorded, SIJ designees stand much closer to lawful permanent residents than to aliens present in the United States for a few hours before their apprehension." * 39

- "This proximity to LPR status is significant because the lawful permanent resident is the quintessential example of an alien entitled to 'broad constitutional protections.' *Castro*, 835 F.3d at 447." *40

- "And once immigrant visas become available and Petitioners attain LPR status, there is no question that they would be excepted from the INA's jurisdiction-stripping provision, such that any attempt to enforce removal orders previously issued against them would be subject to our review. 8 U.S.C. § 1252(e)(2)(C) (allowing judicial review as to whether the petitioner is 'an alien lawfully admitted for permanent residence")." *40

- "To emphasize what it perceives as the gulf between a lawful permanent resident and a SIJ designee, the Government makes much of the fact that adjustment of status is a discretionary determination, to which aliens are not entitled merely by virtue of having obtained SIJ status or having filed an adjustment application." *40

    - "Nothing in our precedent suggests that the lack of lawful permanent resident status, potential inadmissibility, or the happenstance that visas are not currently available is dispositive in assessing an alien's entitlement to habeas review." *41
    - "We consider these circumstances, including Petitioners' proximity to LPR status with its even fuller range of rights, as further evidence of their meaningful and substantial connection with the United States." * 41

Commentary:

- "Petitioners' release from physical detention prior to oral argument in this matter does not affect our jurisdiction because, although habeas relief is limited to those 'in custody,' 28 U.S.C. § 2241(c), the 'in custody' inquiry is made 'at the time the petition was filed,' *Spencer v. Kemna*, 523 U.S. 1, 7 (1998), and, in any event, the limitation 'has not required that a prisoner be physically confined' so long as the release is 'not unconditional,' *Maleng v. Cook*, 490 U.S. 488, 491 (1989)." *10 n.6

- "This is not to suggest that aliens must be accorded a formal statutory designation and attendant benefits to lay claim to 'substantial connections' to this country, or indeed, that an alien must have such connections to invoke the Suspension Clause. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 202 (D.C. Cir. 2001) (pointing out that *Verdugo-Urquidez* did not state that 'only' individuals who have 'substantial connections' are entitled to constitutional protections and, in concluding that the appellant had developed such connections, declining to undertake 'as a general matter . . . how 'substantial' an alien's connections with this country must be' to merit constitutional protections). We need not address here what minimum requirements aliens must meet to lay claim to constitutional protections. We hold merely that SIJ designation and the relationship to the United States to which it attests are more than sufficient." *30 n.13