

Do Caribbean Aliens have any Due Process Rights?

ZADVYDAS, AKINWALE, SERETSE-KAMA AND REMOVAL

On November 9, 2002, the United Nations Security Council unanimously passed Resolution 1441 telling Iraq to disarm and to dismantle and destroy its suspected arsenal of weapons of mass destruction. It has been reported in the Press that, Iraq having accepted the terms of Resolution 1441, has permitted Dr. Hans Blix and another member of the Inspection Team to enter Iraq to make preparations for Inspection to comply with Resolution 1441.

Around the world Resolution 1441 and Iraq's acceptance of its terms have brought a great sense of relief. Some of the fears, tensions and uncertainties that had kept the nation spellbound for months have been lessened. War is no longer the inevitable outcome of the United States policy decision that Iraq must disarm.

There has been such uncertainty about our American way of life since September 11, that it is difficult to tell anyone what is to be considered as normal. The security of the nation has been discussed in this last year than at any other time in the country's history. Separated by two great oceans from any other land mass, Americans had reason to feel safe in their homeland. We all know that the events of September 11 show that America is vulnerable to terrorists and the citizens rightly demand that the Government must take action to insure the safety of the nation.

Notwithstanding the damage done to the security of the nation by 9-11 terrorists, it is essential that America remains a free country in which all its citizens and visitors can travel from one part of the country to another without let or hindrance; a free country in which all people here can live at peace in their communities with their families and children and can be assured of the protection of the law. If the citizens and residents and visitors to this country do not have that sense of freedom, America would be losing something that it holds dear and that something is what we normally describe as life in a democratic society. Many aliens who reside in the United States do not now have a feeling that they belong to this great Nation and many do not feel that America wants them here. That feeling of being un-wanted did not begin on 9-11, but it has been magnified since then by various governmental acts.

In April 1996, Congress passes the Anti-Terrorism and Effective Death Penalty Act (AEDA). In this Act additional provisions were made for the deportation/removal of aliens who were permanent residents of the United States. It expanded the criteria for crimes of moral turpitude by including persons who are convicted of crimes where a sentence of a year or more could be imposed. It eliminated judicial review of the crimes for which the persons had been convicted and it broadened the definition of aggravated felony to include additional crimes. A Legal Permanent Resident or other alien was made deportable if he committed an aggravated felony at any time after entry, whether the offense was classified as an aggravated felony at the time of conviction or not. Murder, rape, sexual abuse of a minor, drug trafficking, possession of drugs, illicit trafficking in firearms, money laundering, any crime of violence; theft for which

imprisonment of 1 year was imposed, fraud or deceit involving a sum in excess of \$10,000.00. This list is not exhaustive. The AEDA was followed in September 1996 by an even more draconian statute, the Illegal Immigration Reform and Immigrant Responsibility Act – (IIRIRA). Under the IIRIRA, an aggravated felon could be arrested and retained in custody without bond until administratively he could be deported to his country of origin. He could not apply to the Immigration Judge for a Waiver notwithstanding the length of time that he had resided in the United States; notwithstanding his previous good character; and notwithstanding any outstanding equities in his favor. It did not matter when the offense was committed. This aggravated felon can now be arrested and deported.

There is a window of hope for persons in deportation who have been detained by the Attorney General for more than 6 months and who have not been deported. It was widely thought that after IIRIRA once the alien was arrested on the allegation that he was an aggravated felon, he had no further legal rights. He could have his matter dealt with by an Immigration Court to determine if he was the individual who was convicted of the alleged offense but that was all. The Supreme Court has now held, however, that every person in the United States has the right of due process under the US Constitution and to the writ of Habeas Corpus if he is being illegally detained by the Government

In **Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491**, the Supreme Court held that the Attorney General may only detain an alien for 180 days to determine to which Country to deport him. **Zadvydas** was an incorrigible criminal but he had to be paroled into the United States as no country would accept him and he had been born in a stateless place. **ZADVYDAS** is important for aliens especially those who have been locked up for upwards for one year, including some Jamaicans. They now have a window of hope that they can be paroled, The language used by Justice Breyer is so expressive that I quote the central theme:

"Once an alien enters the country the legal circumstance changes for the due process clause applies to all persons within the United States including aliens, whether their presence here is lawful, unlawful, temporary or permanent. Aliens who have once passed through our gates, even illegally may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law".

Another important case is that of **Seretse-Kama v. Ashcroft**. He too was a much convicted criminal. He was born in Liberia but came to the US at the age of 8 years. He had cut off all ties with Liberia in that he knew no one there, did not speak the language and was not in touch with anyone in Liberia. Liberia did not issue to him a travel document and he was paroled into the United States, following the decision in **Zadvydas**.

NAJJAR v. Ashcroft is a case from the Federal Court of the Southern District of Florida. He entered the United States as a potential refugee, studied here, and was married here. After residing in the US for some 18 years he was declared deportable. The District Judge held that she would apply the principle in **ZADVYDAS** to the case but denied relief as Najjar's deportation was imminent due to irregularities for which he was responsible.

I am aware of a decision from the 11th Circuit that tends to cut down what I consider to be the clear words and intent of **Zadvydas**, to say that the 180 day period that the Attorney General has to deport an alien only commences when the individual's administrative remedy has been finally decided. It is the case of **Akinwale v. Ashcroft, 287 F. 3d. 1052.**

The Habeas Corpus principle that Justice Breyer reinstated for aliens in deportation proceedings is one of the cornerstones of the liberty of the subject in these United States. We inherited it from the English settlers who carried the MAGNA CARTA of King John with them across the ocean. Habeas Corpus was central to the Great Charter of 1215.

One of the pieces of legislation that emanated from Congress in the aftermath of 9-11 was the **PATRIOT'S ACT**. It carried an attack on Habeas Corpus. I have resolutely defended the institution of Habeas Corpus and I have unreservedly criticized the attack upon this most sacred of human rights, the right to personal freedom, in other words, the right to freedom from wrongful detention. Habeas Corpus entitles the petitioner to immediate release if the judge finds that he has been unlawfully detained. In my **legal practice** I have used this legal weapon to very good use. At this time I have several pending petitions for Habeas Corpus. The Federal Court has ordered an Oral Hearing in one such Petition during the course of this week. That young man will have an opportunity to let his case be heard in open Court and not by some administrative tribunal in private. The **PATRIOT ACT** is quietly being revised by the Attorney General. Suspected terrorists in detention are being given access to attorneys and trials will not be in closed military courts. Public disapproval of the loss of freedom as we know it has caused the administration to restore in some measure the freedoms to which the citizens are entitled.

A problem which is recurring in Florida with great frequency is that which relates to domestic violence. There are many thousands of families in this area of Florida who have Caribbean roots and who embrace consciously and unconsciously Caribbean mores and attitudes. Let me stress the least obvious - the way some Caribbean people discipline their children.

When I was at school in Jamaica, certain of the masters had authority to inflict limited corporal punishment. In the home, parents exercised the right to administer a slap on the buttock to a delinquent child. Some went further but it would have been unusual to find a zero tolerance for all forms of physical punishment of children in a Jamaican home and I dare say in other homes across the Caribbean. Parents of West Indian background who have not come across the Legal system in Florida might still believe that a limited form of physical punishment is acceptable. I am here to tell you that it is not.

Section 827.03 of the Florida Statutes deal with child abuse and it defines "child abuse" to mean the intentional infliction of physical or mental injury upon a child. One who actively encourages another to abuse a child, such as a parent, or stands by and does nothing to prevent abuse of a child is guilty of an offense. A person convicted of such an offense is guilty of a third degree felony that is punishable by a sentence of 5 years imprisonment and a fine of \$10,000.00. In addition is an aggravated felony for purposes of the Immigration and Nationality Act and such a person, if an alien, will be deported from the United States.

I know of a case in which a father used his belt to beat his 14 year old son who he suspected to be involved in drugs and guns. His 11 year old son called 911 and reported that his father was beating his brother. The Police arrived. The father was arrested and convicted. The step-mother, herself a law-enforcement officer, told the Police when they arrived that there was no problem in the house. She was arrested for obstructing the Police and she was convicted.

There is the other case where the son was disciplined for stealing. The father is at Krome because the boy called 911 and reported that his father had flogged him. The boy is crying his head off that he was the guilty party and not the father but that does not change things. In the first case I told you about the Judge who found as a matter of fact that the father loved his sons and that in using his belt to discipline the boy he was doing no more than was the custom of his homeland and therefore the man was not given a prison term. The State was not satisfied. They appealed against the sentence of Probation. That only goes to show how serious the State treats cases of violence involving children.

It is totally impermissible for a husband to hit or threaten his Wife with violence. It is totally impermissible for a Wife to hit or to threaten her husband with violence. If this happens, the one the aggressive party, if an alien, will be on his/her way out of the country.

THE HAITIAN PROBLEM.

We are all familiar with US legislation that relates to Cuban citizens that go back to the Cuban Refugee Adjustment Act Of 1966. That Act is open ended and provides no cut-off date for applicants. There is no similar legislation for Haitian nationals who attempt to come into the United States. As the Immigration Statute is presently operated, if a Cuban national arrives on US shore he is immediately paroled into the United States and at the expiration of one year is eligible to apply for permanent residence in the United States. If a Haitian national manages to make the hazardous journey from Haiti to the United States, there is no similar legislation to enable him to be paroled into the United States. The conditions that are said to exist in Haiti, whether they be political or economic, are far worse than those that exist in Cuba. Yet those refugees from Haiti are treated in a diametrically different manner than those who arrive from Cuba. Something appears to be wrong with the Country's immigration policy as it affects suffering Caribbean peoples.

By Professor David P. Rowe speaking at a Townhall Meeting, Fort Lauderdale, Florida, U.S.A.

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