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UC Irvine law students win 9th Circuit immigration appeal

By Steven Crighton
Daily Journal Staff Writer

A Salvadoran immigrant's fight against her deportation has prompted the 9th U.S. Circuit Court of Appeals to enter the fray on the circuit-splitting immigration issue.

The opinion published last week, granting appellant Celia Diaz Martinez's request for review of her rejected appeal to the Board of Immigration Appeals, was the result of efforts by students of UC Irvine School of Law's appellate litigation clinic. Backed by clinic co-directors Peter Afrasiabi and Kathryn M. Davis, certified law students Marcel Budiono and Octavio Velarde argued the Salvadoran woman's case in April.

Remanding, the panel held 2-1 that a premature petition for review of an immigration order "may ripen upon final disposition of the case by the BIA" and found the board abused its discretion in denying Diaz Martinez's appeal of a lower court order on faulty grounds.

Afrasiabi, a copyright attorney at One LLP and a lecturer at UC Irvine law school, said the 9th Circuit's decision aligned closely with the 2nd, 3rd, and 11th Circuits while running contrary to the 5th and 6th Circuits.

"There's a massive circuit split on the issue," Afrasiabi explained. "So it's an important decision."

The circuit shift feels particularly important, Afrasiabi said, given that for many asylum seekers a direct appeal to a circuit court represents the one and only time they'll "get to go before a real federal court."

"Win, lose or draw, they just want to have their day in court," Afrasiabi said. "And in this case,

the court really properly followed through."

Accused of entering the country illegally somewhere near San Ysidro in August 1989, Diaz Martinez was charged in 2007 as an alien present in the U.S. without admittance. She complied with appearance requests through June 2010, the panel noted, when she submitted a change of address to the immigration court and the government.

The same day, the government issued an amended notice to appear conflicting with one previously served, sent to Diaz Martinez's old address, the panel held. Both Diaz Martinez and her lawyer said they never received the notice, and the government lacked any evidence that either had been served.

The immigration judge overseeing the case ordered Diaz Martinez removed in absentia when she failed to appear for her hearing on the amended date and later rejected her motion to reopen her case. *Celia Diaz Martinez v. William P. Barr*, 17-72186 (9th Cir. filed Oct. 30, 2019).

She petitioned the judge's decision to the immigration appeals board, and while awaiting their judgment, appealed to the 9th Circuit for review. The board rejected Diaz Martinez's request before the 9th Circuit panel could consider the merits of the case, which the clinic team argued cured any defect with her premature filing.

The panel, comprised of Circuit Judges Richard A. Paez and Richard R. Clifton and International Trade Court Judge Gary S. Katzmann, agreed the board's issuance of a decision ahead of 9th Circuit review removed any dispute about subject matter jurisdiction.

"The removal order relied on Diaz Martinez's admissions to the amended NTA, despite the fact



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One LLP appellate and copyright attorney Peter Afrasiabi lectures at UC Irvine School of Law.

that she received no notice of and made no admissions to charges and factual allegations contained in the amended NTA. Accordingly, the removal order was unsupported by substantial evidence," Katzmann wrote in the panel's opinion.

UC Irvine law student Marcel Budiono told the Daily Journal his portion of argument was dedicated to procedural issues while his classmate Octavio Velarde argued the merits. Arguing before the panel marked the first litigation experience for both students.

"It was nerve-wracking," Budiono said. "Looking back on the video, time flew so fast."

Going into the case, Budiono said he felt as though they were facing an uphill battle, but he was heartened by favorable-leaning questions from Paez and Katzmann, who ultimately found in their favor.

Following months of research and rigorous preparation, Velarde said he wasn't nervous by the day of the hearing. He contrasted the experience with the first mock argument they'd run in preparation for the actual argument, which

Velarde said hadn't gone so well.

"By that time, we'd done all the research," Velarde said. "We'd practiced it so much and got all the questions in, [and] we'd been dealing with the professor's curve balls in mock arguments."

Both have since graduated and are awaiting their bar exam results. Budiono has accepted a position at Rutan & Tucker LLP while Velarde now works at Schwartz, Steinsapir, Dohrmann & Sommers.

Meanwhile, the clinic rolls on, Afrasiabi said, as he's working with two students on an appeal brought by a Guatemalan girl who he said was raped at age 10 and denied asylum. The clinic frequently looks to tackle immigration issues, Afrasiabi said, adding he believes important questions rarely get addressed when many defendants aren't situated to lodge a proper legal argument.

"It really is a magnificent program," Afrasiabi said. "It gives 3L students real experience in real systems that aren't perfect."

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