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Refugee Litigation Notes

Arthur S. Leonard

L G B T

LAW NOTES

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Michigan Supreme Court Rules That State Civil Rights Law Protects LGBTQ+ People

as a living instrument which gives significant room for the realization and enjoyment of individuals' human rights." Justice Robertson also noted that courts in Africa, Asia, Australia, the Americas, the Caribbean, and Europe had already struck down similar laws.

Thus, Justice Robertson concluded that the claimants had made out a *prima facie* case of infringement of their constitutional right to liberty, protection of the law, freedom of expression, protection of personal privacy and protection from discrimination on the basis of sex. Indeed, respondent conceded that Sections 12 and 15 of the Act infringed the rights of claimants and other similarly situated persons. For a remedy, the court struck down the laws to the extent they applied to consensual relations between persons sixteen-years-old and older, and enlarged the exclusion of the sexual indecency to no longer apply to persons over the age of sixteen. The Court also awarded claimants their costs.

The claimants were represented by Attorney Andrew O'Kola and Senior Counsel Douglas Mendes. The case is part of a coordinated effort led by the Eastern Caribbean Alliance for Diversity and Equality, which seeks to overturn similar colonial-era laws in Barbados, Saint Lucia, St. Kitts and Nevis and Grenada as well. ■

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REFUGEE LITIGATION *notes*

REFUGEE LITIGATION NOTES

By Arthur S. Leonard

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U.S. COURT OF APPEALS, 3RD CIRCUIT – The 3rd Circuit denied a petition to review an adverse ruling from the Board of Immigration Appeals (BIA) suffered by a gay man from Haiti in *Guilmeus v. Attorney General*, 2022 WL 2816785, 2022 U.S. App. LEXIS 19854 (July 19, 2022). The Petitioner entered the U.S. as a lawful permanent resident in 2009, but ten years later Homeland Security placed him in removal proceedings after he incurred criminal convictions (not described in the opinion for the panel by Circuit Judge Luis Felipe Restrepo, but found by the Immigration Judge [IJ] to be "particularly serious crimes."). He applied for asylum, withholding of removal and/or protection under the Convention against Torture (CAT). The IJ found that Petitioner's convictions disqualified him for asylum or withholding, but addressed his CAT claim. Petitioner argued that he would likely suffer torture at the hands of his relatives because he is gay, and that the Haitian government was likely to "acquiesce" in this mistreatment. Although the IJ found his testimony credible, and "observed that his mother and sister had provided testimony and affidavits corroborating aspects of his testimony," he nonetheless was not qualified for protection under the CAT. The IJ observed that Petitioner "testified that he does not believe any government actor would harm him," and that he had never reported any threats to authorities, either in Haiti or the U.S. Addressing the country conditions evidence Petitioner provided, the IJ wrote that "some civil leaders notice a marked improvement in the efforts of the Haitian national police." The BIA agreed with the IJ, and so did the 3rd Circuit panel. On appeal, Petitioner argued that "both the IJ and BIA willfully ignored country condition evidence demonstrating 'widespread and growing violence towards LGBT identified individuals'" in Haiti, and that the BIA "did not provide any reasoning for its decision to ignore such strong circumstantial evidence showing that police officials in Haiti will acquiesce to [Petitioner's] torture." He sought a remand for the BIA to address this evidence, but the court refused to order it. "To the contrary," wrote Judge Restrepo, "we find that the BIA (and the IJ) did in fact consider the evidence [Petitioner] offered to support his CAT claim. We may not 're-weigh evidence or . . . substitute [our] own factual determinations for those of the agency,'" wrote the court, citing a prior 3rd Circuit decision. Judge Restrepo pointed out that the BIA had stated that "the Country Report states that there are no laws criminalizing consensual same-sex conduct between adults in Haiti. On the contrary, the [IJ's] determination . . . noted a marked improvement in the efforts . . . to address the needs of the LGBTI community . . ." Thus, concluded the court, the BIA "did not err by failing to properly consider the record evidence in affirming the IJ's decision." This strikes us as fatuous reasoning. "Marked improvement" is a comparative phrase, not a determination of effectiveness. It just means "better than it was before," without any reference to how bad it was before or how much "better" it had become. Unfortunately, this decision is probably the end of the line for Petitioner's efforts to remain in the U.S. He is represented by Upnit K. Bhatti and Melanie L. Bostwick of Orrick Herrington & Sutcliffe, Washington, D.C. office. Judge Restrepo was appointed by President Barack Obama. The other judges on the panel were Senior Judges Jane Richards Roth (George H.W. Bush) and Julio Fuentes (Bill Clinton).

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

U.S. COURT OF APPEALS, 7TH CIRCUIT – A 7th Circuit panel ruled in *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 2022 U.S. App. LEXIS 20890, 2022 WL 2980350 (July 28, 2022), that the Archdiocese and its Roncalli High School enjoy immunity from suit under the 1st Amendment "ministerial exemption" from federal and state law claims by Lynn Starkey, whose contract as Co-Director of Guidance at Roncalli was non-renewed when she revealed that she was in a same-sex union (in reaction to learning that the other co-director had been suspended for entering into a same-sex relationship). District Judge Richard L. Young confronted a motion to dismiss Starkey's Title VII and state contract and tort law claims by going directly to the constitutional doctrine and finding, based on the summary judgment record, that Starkey came within the scope of the ministerial exception as described by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), and most recently the *en banc* 7th Circuit in *Demkovich v. St. Andrew the Apostle Parish*, 3 F. 4th 968 (2021). Although Starkey is not a Catholic and disclaimed having any particular ministerial duties as part of her job, she had signed an employment contract describing her job as part of the ministry of the school, and as Co-Director of Guidance had "helped draft performance criteria for Roncalli to evaluate the guidance counselors under her supervision" that explicitly described the counselors' role in terms of developing the students' "spiritual life," and referred to them as "ministers of the church" even though they were not ordained. Her "school teacher employment contract" also had a morals clause requiring that employees "refrain from 'any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church,'" and the most recent contract she had signed (after same-sex marriages became an issue in Indiana due to the Supreme Court's *Obergefell* decision) specifically stated that an employee would be "in default" if they were to engage in a relationship "contrary to a valid marriage as seen through the eyes of the Catholic Church," whose catechism defines marriage as between a man and a woman. Applying these precedents and contractual provisions, Judge Young had little difficulty finding that the ministerial exception applies, granting the motion for summary judgment. The 7th Circuit panel agreed, in an opinion by Circuit Judge Michael Brennan (a Trump appointee), which also took note of the church autonomy doctrine that might apply even if Starkey were deemed not to be a ministerial employee, and rejected Starkey's argument that the various quoted documents were not accurately descriptive of facts on the ground, even though she did not directly contend that they were pretextual. The court also ruled that Starkey's state law claims were precluded as well, since they "implicate ecclesiastical matters because they litigate the employment relationship between the religious organization and the employee." In a concurring opinion, Circuit Judge Frank Easterbrook (a Reagan appointee), commented, "It is a stretch to call a high school guidance counsellor a minister. Even if the school expects counsellors to pray with students and discuss matters of faith with them, the job is predominantly secular. Designating the position as a minister by contract cannot be called pretextual, however, so I do not object to the majority's conclusion." But he stated concern that the court did not first engage with the question whether this case was governed by the religious organization exemption under Title VII, which could obviate the need to make a constitutional ruling and, by knocking out the federal question in the case, would allow for dismissal of the state law claims as a matter of jurisdictional discretion. He contended that it was possible to interpret Section 702(a), 42 U.S.C. Se. 2000e-1(a), the religious organization exemption, as applicable to this case. The third member of the panel, Circuit Judge Amy St. Eve, is also a Trump appointee. Starkey is represented by Kathleen A. DeLaney and Matthew R. Gutwein, of Delaney & Delaney LLC, Indianapolis. The court received a pile-on of amicus briefs, mostly in support of the defendants, who were represented by the Becket Fund for Religious Liberty. Amici supporting defendants included the Christian Legal Society, the Mormon Church, several state attorneys general from "Red States," the Associate of Christian Schools International, but amici also weighed in on the other side, led by Americans Untied for Separation of Church and State.

U.S. COURT OF APPEALS, 8TH CIRCUIT – In *School of the Ozarks, Inc. v. Biden*, 2022 WL 2963474, 2022 U.S. App. LEXIS 20734 (July 27, 2022), a three-judge panel of the 8th Circuit Court of Appeals granted the government's motion to dismiss an action brought by Alliance Defending Freedom (ADF) on behalf of School of the Ozarks, seeking an injunction "setting aside" and blocking enforcement of a memorandum that had been issued by an official of the Department of Housing and Urban Development in response to President Biden's executive order directing federal agencies to follow the Supreme Court's *Bostock* decision in interpreting and enforcing bans on sex discrimination. The School is described in the opinion for the panel majority by Circuit Judge Steven Colloton as "a private Christian college in Missouri." The School provides dormitory housing for its