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1. *Ndungu v. Cangemi, 2004 U.S. Dist. LEXIS 14154*

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# Ndungu v. Cangemi

United States District Court for the District of Minnesota

July 23, 2004, Decided

Civil No. 04-2791 ADM/RLE

**Reporter**
2004 U.S. Dist. LEXIS 14154 *; 2004 WL 1660262

Nazario Tevin Nyaga Ndungu, Petitioner, v. Mark Cangemi, District Director U.S. Immigration and Customs Enforcement; Tom Ridge, Secretary Department of Homeland Security; and John Ashcroft, United States Attorney General, Respondents.

**Disposition:** **[*1]** Petition for a Writ of Habeas Corpus was DENIED and Petitioner's Motion for a Temporary Restraining Order ("TRO") was DENIED as moot.

## Core Terms

frivolous, asylum, removal, immigration, judicial review, deliberately, proceedings, fabricated, alien, habeas corpus, removal order, deportation

## Case Summary

**Procedural Posture**
Petitioner alien filed a petition for a writ of habeas corpus and a motion for a temporary restraining order to prevent his removal from the United States.

**Overview**
The alien entered the U.S. on a student visa. When he was no longer attending school, removal proceedings against him were initiated. After the alien expressed a desire to apply for asylum, he was warned that any fabrication would lead to him being barred forever from receiving any benefits under the Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.* Despite the warning, the alien lied and said that his parents had died in an unexplained car accident. He later admitted his misrepresentation. The immigration judge denied the alien's asylum application and made a finding of frivolousness based upon material and deliberate fabrication under *8 U.S.C.S. § 1158(d)(6).* The alien did not challenge that he was validly subject to removal; rather, he challenged the frivolous application finding. In denying the alien's petition, the court held that a finding of frivolousness fell within the parameters of *8 U.S.C.S. § 1252*, which confined review of deportation orders to the courts of appeals and barred judicial review of decisions by the U.S. Attorney General in the adjudication of removal orders. The court held that the alien's proper remedy was to appeal to the court of appeals.

**Outcome**
The court denied the alien's petition for a writ of habeas corpus. The court denied the alien's motion for a temporary restraining order as moot.

## LexisNexis® Headnotes

Administrative Law > Judicial Review > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Reviewability > Preclusion

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > Sovereign Immunity

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

*HN1*[] **Administrative Law, Judicial Review**

In suits against an arm of the United States brought under *28 U.S.C.S. § 1331*, the Administrative Procedures Act (APA), *5 U.S.C.S. § 701 et seq.*, may serve as the requisite waiver of the government's sovereign immunity to allow the court to hear the claim. The APA creates an entitlement to judicial review for a person adversely affected or aggrieved by agency action. It further provides that final agency action for which there is no other adequate remedy in a court is subject to judicial review, except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. *5 U.S.C.S. §§ 701*, *704*.

Immigration Law > Asylum, Refugees & Related Relief > General Overview

*HN2*[] **Immigration Law, Asylum, Refugees & Related Relief**

*8 U.S.C.S. § 1158* sets forth the procedures and terms of asylum, including rendering an alien permanently ineligible for immigration benefits if the immigration judge determines that an alien has knowingly made a frivolous application for asylum. *8 U.S.C.S. § 1158(d)(6)*. An application is deemed frivolous if any of its material elements is deliberately fabricated. *8 C.F.R. § 208.20*. A "frivolous" finding must be explicit and may only be made after the applicant has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

*HN3*[] **Jurisdiction Over Actions, Exclusive Jurisdiction**

*8 U.S.C.S. § 1252* establishes exclusive jurisdiction for review of orders of removal in the courts of appeals. *8 U.S.C.S. § 1252(a)*, *(b)(2)*, *(g)*. Additionally, it circumscribes judicial review of certain decisions of the Attorney General with express limits, including *§ 1252(g)*.

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

*HN4*[] **Administrative Proceedings, Jurisdiction**

See *8 U.S.C.S. § 1252(g)*.

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

*HN5*[] **Administrative Proceedings, Jurisdiction**

*8 U.S.C.S. § 1252(g)* applies only to three discrete actions the U.S. Attorney General may take within the deportation process: to commence proceedings, adjudicate cases, and execute removal orders.

Immigration Law > Judicial Proceedings > Judicial Review > Consolidation of Issues

Immigration Law > Asylum, Refugees & Related Relief > General Overview

Immigration Law > Deportation & Removal > Administrative

Proceedings > Jurisdiction

Immigration Law > Deportation & Removal > Judicial Review

Immigration Law > Judicial Proceedings > Judicial Review > Discretionary Actions

HN6[] **Judicial Review, Consolidation of Issues**

The finding of frivolousness under *8 U.S.C.S. § 1158(d)(6)* falls within the parameters of *8 U.S.C.S. § 1252*, which confines review of deportation orders to the courts of appeals and bars judicial review of decisions and actions by the U.S. Attorney General in the adjudication of removal orders. *8 U.S.C. § 1252(b), (g)*.

**Counsel:** Herbert A. Igbanugo, Esq., and Riddhi Jani, Esq., Blackwell Igbanugo, Minneapolis, MN, appeared on behalf of Petitioner.

Joan D. Humes, Assistant United States Attorney, Minneapolis, MN, and Richard Soli, Chief Counsel, U.S. Immigration and Customs Enforcement, Bloomington, MN, appeared for and on behalf of Respondents.

**Judges:** ANN D. MONTGOMERY, U.S. DISTRICT JUDGE.

**Opinion by:** ANN D. MONTGOMERY

# Opinion

**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

The instant matter came before the Court on June 18, 2004, on Petitioner Nazario Tevin Nyaga Ndungu's ("Petitioner") Petition for a Writ of Habeas Corpus [Docket No. 1] and Motion for a Temporary Restraining Order ("TRO") [Docket No. 2] to prevent his removal from the United States. At the hearing, counsel for Petitioner conceded that injunctive relief was not warranted and substantially narrowed the focus of his request for judicial intervention. For the reasons stated below, the Petition is denied.

**II. BACKGROUND**

Petitioner is a 29-year-old citizen of Kenya. He entered **[*2]** the United States on August 28, 1996, as permitted by an F-1 student visa. In 1997 Petitioner became the father of a daughter and was no longer regularly attending school. Removal proceedings against him were initiated on March 31, 1999, and he appeared before Immigration Judge ("IJ") Joseph R. Dierkes on September 14, 1999, on charges of ineligibility for the student visa and domestic assault against the mother of his daughter. After a continuance to allow Petitioner the opportunity to obtain counsel, Petitioner appeared in immigration court again on December 7, 1999, without an attorney, and admitted both charges against him. Resp'ts' Ex. 1 at 58-59. The IJ found the charges sustained but continued the hearing so that Petitioner could submit a Form I-589 Application for Asylum and Withholding of Removal. *See id.* at 14-21. At the time of this hearing, the IJ warned Petitioner orally and by means of a printed advisory that if he deliberately fabricated responses, thereby filing a frivolous application, he would be permanently precluded from receiving any benefits under U.S. immigration laws. *Id.* at 13, 66-67 (the written Notification states: "If you knowingly file a frivolous **[*3]** [deliberately fabricated] application for asylum, YOU WILL BE BARRED FOREVER from receiving any benefits under the Immigration and Nationality Act.") (emphasis in original).

Petitioner filed his asylum application on February 8, 2000, at which time the IJ set the final hearing date and urged Petitioner to retain counsel. *Id.* at 73-74. In his printed application for asylum Petitioner represented that he feared returning to Kenya because of the political affiliation and activities of his grandfather, who he stated was assassinated. *Id.* at 18. He specifically stated that both his parents were also deceased, due to an "unexplained" car accident. *Id.* at 17.

Petitioner appeared at the final hearing, May 2, 2000, without an attorney. During questioning by the IJ and counsel for the then-INS, Petitioner admitted that his father had died of natural causes and that his mother was still living. *Id.* at 105-10. Upon further examination by the court, Petitioner explained that he did not want to return to Kenya because he feels he may have used and disappointed his family, and does not like living there because of his grandfather's history. *Id.* at 112-13. He testified that **[*4]** he made the false assertion about his parents' death because he was nervous, and possibly was seeking to make his application stronger. *Id.* at 106-07.

At the conclusion of the hearing, the IJ denied Petitioner's asylum application and made a finding of

frivolousness based upon material and deliberate fabrication. *Id.* at 139-41. Petitioner was ordered removed and was taken into custody immediately following the hearing and decision. Petitioner remained in custody until June 6, 2000, when he was released on bail. He subsequently filed a pro se appeal of the IJ's denial of relief, which was dismissed by the Board of Immigration Appeals ("BIA") on March 12, 2002. He did not appeal the decision further. Petitioner then "went underground" until April 20, 2004, when immigration authorities arrested him at his place of work in Rochester, Minnesota and placed him in the Ramsey County Correctional Facility. [1] Pet. at 6.

**[*5]** The memoranda and documentation submitted in support of the instant Petition cite multiple grounds of and bases for relief. However, at the time of oral argument, counsel for Petitioner withdrew numerous claims and arguments and focused on the sole request that the Court reverse the IJ's finding of a frivolous asylum application. Respondents contest the Motion, asserting that the Court has no jurisdiction to review the decisions of the IJ rendered in a final order of removal.

## III. DISCUSSION

### A. Jurisdiction

In addition to federal habeas corpus, Petitioner invokes the Administrative Procedures Act ("APA"), *5 U.S.C. § 701 et seq.*, as a basis of jurisdiction.

#### 1. Writ of Habeas Corpus

Although Petitioner initially sought relief via a writ of habeas corpus, he has now stipulated that his detention was legal and that he was validly subject to removal. Therefore, this avenue of jurisdiction is no longer relevant and the Petition itself is moot. *28 U.S.C. § 2241* (requiring the petitioner be in custody for habeas relief); *Zalawadia v. Ashcroft, 371 F.3d 292, 300, 301 (5th Cir. 2004)* (stating that even when **[*6]** prisoner is no longer in physical custody, collateral consequences of detention may provide a basis to challenge the "underlying *illegal judgment*"; holding only habeas remedy for a deported alien is vacation of removal order) (emphasis added). Accordingly, the Court will proceed to the underlying request for broader review of the IJ's ruling, as finalized by the BIA's dismissal of Petitioner's appeal.

#### 2. APA

For his present action to dislodge the IJ's "frivolous application" finding, Petitioner relies on the APA, in conjunction with general federal question jurisdiction. *See 5 U.S.C. § 702*; *28 U.S.C. § 1331*. The Eighth Circuit has held that ***HN1***[] in suits against an arm of the United States brought under *28 U.S.C. § 1331*, the APA may serve as the requisite waiver of the government's sovereign immunity to allow the court to hear the claim. *Sabhari v. Reno, 197 F.3d 938, 943 (8th Cir. 1999)*; *see also Shanti, Inc. v. Reno, 36 F. Supp. 2d 1151, 1161 (D. Minn. 1999)* (Davis, J.). The APA creates an entitlement to judicial review for a "person … adversely affected or aggrieved **[*7]** by agency action." *Id. § 702*. It further provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review," "*except to the extent that* (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id. §§ 704, 701* (emphasis added). Thus, the issues are whether judicial review of a frivolous application finding is proscribed by law or whether the determination is an action committed to agency discretion.

Section 208 of the Immigration and Nationality Act ("INA") ***HN2***[] sets forth the procedures and terms of asylum, including the key provision in this case rendering an alien permanently ineligible for immigration benefits if the IJ "determines that an alien has knowingly made a frivolous application for asylum." *8 U.S.C. § 1158(d)(6)*. An application is deemed frivolous "if any of its material elements is deliberately fabricated." *8 C.F.R. § 208.20*. A "frivolous" finding must be explicit and may only be made after the applicant "has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim." **[*8]** *Id.*

Respondents contend the INA, as amended by Congress in 1996, precludes review of the IJ's ruling, such that the APA does not apply. *5 U.S.C. § 701(a)(1)*. Additionally, they argue that the grant or denial of asylum is a matter of the Attorney General's discretion and therefore explicitly excepted from review under the APA. [2] *Id. § 701(a)(2)*.

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[1] On April 24, 2003, Petitioner married his wife, a United States citizen, with whom he was residing in Rochester prior to his most recent detention.

[2] Whether to grant asylum to an applicant who meets the qualifications for refugee status is based upon "the exercise of discretion" of the IJ. *8 C.F.R. § 208.14(a)*. Respondents offer no similar citation or argument with respect to the IJ's determination of a frivolous filing. Despite the discretionary

**[*9]** *8 U.S.C. § 1252*, added to the INA in 1996, ***HN3***[] establishes exclusive jurisdiction for review of orders of removal in the Courts of Appeals. *Id. § 1252(a),(b)(2),(g)*; *Shah v. Reno, 184 F.3d 719, 722 (8th Cir. 1999)*. Additionally, it circumscribes judicial review of certain decisions of the Attorney General with express limits, including *subsection (g)*, which reads as follows:

> ***HN4***[] Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

*8 U.S.C. § 1252(g)*. Although the language appears sweeping, the Supreme Court has held that ***HN5***[] this provision "applies only to three discrete actions the Attorney General may take" within the deportation process: to commence proceedings, adjudicate cases, and execute removal orders. *Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482, 142 L. Ed. 2d 940, 119 S. Ct. 936 (1999)*.

Respondents **[*10]** argue that the plain language of the text of *§ 1252* deprives this Court of the ability to adjudicate Petitioner's complaint. Were this a standard attack on Petitioner's removal, the issue would be relatively straightforward. However, complexity is added because Petitioner's challenge is not to the IJ's order of removal, but to the specific, discrete finding that Petitioner filed a frivolous asylum application, as defined by *8 C.F.R. § 208.20*. Petitioner's concession that his removal order is valid and that he is does not qualify for asylum presents an unusual circumstance.

Petitioner relies on the precedent established by *Sabhari v. Reno, 197 F.3d 938, 943 (8th Cir. 1999)* and *Shanti, Inc. v. Reno, 36 F. Supp. 2d 1151, 1161 (D. Minn. 1999)*, to support application of the APA to his claim. In *Sabhari,* the Eighth Circuit found the APA provided jurisdiction over the plaintiff's challenge to the BIA's denial of his petition for adjustment of status, despite *§ 1252(g)*. *Id. at 943*. It held that because adjustment of immigration status "is separate and distinct from any matter related to an order of deportation," *§ 1252(g)*'s **[*11]** elimination of judicial review did not apply to the particular administrative action at issue. *Id. at 942*. Likewise, in *Shanti,* Judge Michael Davis stated that *§ 1252* did not preclude review of the denial of a nonimmigrant visa because that agency decision was "outside the scope of removal proceedings." *Id. at 1158*.

Unlike the facts of these cases, which involved "actions unrelated to orders of removal," the present matter directly implicates Petitioner's deportation order. *Sabhari, 197 F.3d at 940*. The challenged determination here, a finding of a frivolous application, was a result of and occurred during Petitioner's removal proceedings and was a component of the decision to deny the request for asylum and withholding of removal. Resp'ts' Ex. 1 at 138-41 (Order of the Immigration Judge); *see 8 U.S.C. § 1252(b)(9)* ("Judicial review of all questions of law and fact ... arising from any ... proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."). ***HN6***[] The finding of frivolousness thus falls within the parameters of *§ 1252*, **[*12]** which confines review of deportation orders to the courts of appeals and bars judicial review of decisions and actions by the Attorney General in the adjudication of removal orders. *8 U.S.C. § 1252(b),(g)*. Petitioner's proper remedy would have been an appeal to the Eighth Circuit. *See* *Bowen v. Mass., 487 U.S. 879, 903, 101 L. Ed. 2d 749, 108 S. Ct. 2722 (1988)* (although the statute is broad, "the general grant of review in the APA" was not intended to provide "'additional judicial remedies in situations where the Congress has provided special and adequate review procedures'"). Petitioner cites no authority holding that a district court may review an IJ's frivolous application finding made in the context of adjudication of an immigrant's removal, and therefore fails to refute the apparent statutory preclusion of judicial review by the district court. Accordingly, the APA does not supply jurisdiction over Petitioner's claim. *See 5 U.S.C. § 701(a)(1)*.

Even assuming for purpose of argument that this Court has jurisdiction to evaluate a finding of frivolousness, Petitioner offers little to rebut the IJ's determination, which is generally **[*13]** entitled to deference. *See* *Sabhari, 197 F.3d at 943-44* (reviewing BIA's ruling

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nature of asylum, it is not clear that a frivolous application finding, a distinct decision, would be deemed "committed to agency discretion," due to the explicit legal definition of a frivolous application. *8 C.F.R. § 208.20*; *see* *Shanti, 36 F. Supp. 2d at 1160-61* (stating that the "exception to judicial review set forth in [APA]***§ 701(a)(2)*** is a 'very narrow' one," and that an immigration decision "governed by regulations" is not an area of discretion). Because this case can be resolved based on the first exception to the APA, the issue will not be further addressed here.

under "substantial evidence" standard). Petitioner was properly advised of the consequences of filing a frivolous application, that is, an application in which any material element "is deliberately fabricated." Resp'ts' Ex. 1 at 13, 66-67 (printed and oral warnings). At his hearing, Petitioner admitted he knowingly fabricated the story of his parents' death and essentially conceded the materiality of this statement when he indicated he thought it would strengthen his claim of fear of persecution. *Id.* at 109-10. Although he recanted upon questioning, courts have held that after-the-fact explanations are not the same as accounting for "any discrepancies or implausible aspects of the claim," and thus do not excuse the deliberate misrepresentation. *8 C.F.R. § 208.20*; *Barreto-Clara v. The U.S. Attorney General, 275 F.3d 1334, 1339 (11th Cir. 2001)*. Accordingly, if the Court had jurisdiction to review the determination of frivolousness, Petitioner has not shown that the IJ's finding, pursuant to the regulatory definition and requirements, was supported **[*14]** by less than substantial evidence.

**IV. CONCLUSION**

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that the Petition for a Writ of Habeas Corpus [Docket No. 1] is **DENIED** and Petitioner's Motion for a Temporary Restraining Order ("TRO") [Docket No. 2] is **DENIED** as moot.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

BY THE COURT:

s/

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: July 23, 2004.

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