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REOPENING A CASE FOR THE MENTALLY INCOMPETENT IN LIGHT OF *FRANCO-GONZALEZ V. HOLDER*¹ (November 2015)

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(I) INTRODUCTION

This Practice Advisory analyzes how the settlement agreement from the class-action lawsuit in the Central District of California, *Franco-Gonzalez v. Holder*,⁴ can assist mentally incompetent individuals who have been removed or deported to reopen their cases. The *Franco* lawsuit alleged that individuals in immigration detention who are incompetent to represent themselves because of a serious mental disorder are entitled to legal representation in their immigration cases. The Settlement Agreement and Court Order that stemmed from that lawsuit extended specific protections to some people who have already been deported.

This Practice Advisory describes and analyzes the detailed procedures authorized by *Franco*. It also provides a roadmap for those who seek to reopen cases for mentally incompetent individuals wanting to return to the U.S. Some such individuals may be covered specifically by the *Franco* settlement; others may raise analogous claims based on those that succeeded in *Franco*.

This Practice Advisory does not provide comprehensive information about all potential avenues of return for people with serious mental disorders who have been removed from the United States. The Post-Deportation Human Rights Project has another practice advisory entitled *Mentally Incompetent But*

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⁴ No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, *8 (C.D. Cal Apr. 23, 2013).

Deported Anyway: Strategies for Helping a Mentally Ill Client Return to the United States (September 2015) that discusses other potential avenues of return for people with mental illnesses. This practice advisory and other practice advisories discussing post-deportation mechanisms in general, are available on our website, www.bc.edu/postdeportation, or by contacting our office at (617) 552-9261 or pdhrp@bc.edu.

(II) OVERVIEW OF THE *FRANCO* LITIGATION

On March 26, 2010, Plaintiffs filed a petition for writ of *habeas corpus* alleging violations of the Immigration and Nationality Act, Section 504 of the Rehabilitation Act⁵, and the Fifth Amendment to the U.S. Constitution. On November 2, 2010, Plaintiffs filed a first amended class action complaint, alleging that Defendants unlawfully required individuals detained for immigration proceedings in California, Arizona, and Washington who were “incompetent by reason of their mental disabilities, to represent themselves in their immigration proceedings.” On November 21, 2011, the Court granted Plaintiffs’ motion for class certification and certified a Main Class and two Sub-Classes. The Main Class consists of

All individuals who are or will be in DHS custody for immigration proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in immigration proceedings, and who presently lack counsel in their immigration proceedings.⁶

Note that this Main Class is limited to those in “custody” (a term that has historically sometimes been broadly construed for habeas purposes in deportation proceedings). It is also limited to three states. However, it is rather broad in its use of the phrase “may render...”

The first Sub-Class consists of Main Class members who “have a serious mental disorder or defect that renders them incompetent to represent themselves in immigration proceedings, and who presently lack counsel in their immigration proceedings.”⁷

The second Sub-Class consists of Main Class members who have been detained for more than six months.

On April 23, 2013, the Court held that Section 504 of the Rehabilitation Act required Defendants to provide Qualified Representatives to represent the first Sub-Class [“Sub-Class One”] members in all aspects of their removal and detention proceedings. The Court also ordered custody redetermination hearings for individuals in the second Sub-Class “who have been detained for a prolonged period of time greater than 180 days.”⁸

(III) POST-REMOVAL CLASS MEMBERS

The Parties to the *Franco* litigation engaged in continuing negotiations regarding Class members who had already been removed from the United States. On February 27, 2015, the Court entered an order as

⁵ Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (Sept. 26, 1973), codified at 29 U.S.C. § 701 et seq.

⁶ No. 10 CV-02211 DMG (DTBx), 2013 WL 3674492, *2 (C.D. Cal Apr. 23, 2013).

⁷ *Id.* at *2.

⁸ Agreement Regarding Procedures for Notifying and Reopening Cases of *Franco* Class Members Who Have Received Final Orders of Removal, *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2-3 (C.D. Cal February 27, 2015), available at <http://www.ice.gov/sites/default/files/documents/Document/2015/Settlement%20Agreement.pdf>.

full settlement of claims regarding these Class members. The *Franco* settlement and Court Order recognizes “Removal Order Class Members”⁹ including:

- 1) “Post-Injunction Removal Order Class Members,” defined as Removal Order Class Members who received a final order of removal entered on or after April 23, 2013 and before the “Implementation Plan Effective date, defined as the date ninety (90) days after the Court enters the Implementation Plan Order in this case.
- 2) “Pre-Injunction Removal Order Class Members,” defined as Removal Order Class Members who had final orders of removal entered on or after November 21, 2011, but before April 23, 2013.

Pre-and Post-Injunction Removal Class Members must either:

- (a) have remained detained and unrepresented when they received orders of removal without the safeguards mandated by the Court’s earlier orders; *or*
- (b) were released from detention following an Immigration Judge’s determination that they were not competent to represent themselves and who remained unrepresented when they received orders of removal from an Immigration Judge.¹⁰

The Court also recognized a variety of “Private Agreement Removal Order Class Members,” whom the parties have agreed should be eligible for special relief pursuant to the Settlement Agreement.

(IV) PRE- AND POST-REMOVAL REMEDIES UNDER *FRANCO*

i) *Franco* Protections in Removal Proceedings

a. Qualified Representatives under *Franco-Gonzalez*

Pursuant to section 504 of the Rehabilitation Act, a reasonable accommodation for individuals who are deemed not competent to represent themselves is the appointment of a Qualified Representative. A Qualified Representative is defined as: 1) an attorney, 2) a law student or law graduate directly supervised by a retained attorney, or 3) an accredited representative, all as defined in 8 C.F.R. § 1292.1.¹¹

In order to obtain a Qualified Representative under *Franco*, individuals must:

- 1) have been, be, or will be in DHS custody for removal proceedings in California, Arizona, and Washington;
- 2) have a serious mental disorder or defect that renders them incompetent to represent themselves in immigration proceedings or in detention,
- 3) have previously or presently lack counsel in their immigration proceedings.¹²

⁹ *Id.* at 6-7.

¹⁰ The Court recognized that other Class Members who were released prior to receiving a final order of removal may pursue reopening of their proceedings through regular channels.

¹¹ *Franco-Gonzalez*, 828 F. Supp.2d at 1147 (C.D. Cal. May 4, 2011).

¹² *Franco* at *9.

ii) *Franco* Protections After Entry of a Removal Order

Initially, *Franco* afforded protections only to detainees with mental disabilities who were facing deportation and who were unable to adequately represent themselves without legal assistance. However, as the case continued, it became apparent that there had been individuals who were deported during the pendency of the litigation without proper protections. Thus, the later agreement pertaining to those who have already been removed provides a way for those deported individuals to file motions to reopen their case.

Per the settlement agreement¹³, the Department of Homeland Security (DHS) agrees to favorably exercise its discretion *to join and to file a motion to reopen* for all qualifying Removal Order Class Members described above. The Settlement Agreement, does not, of course, guarantee substantive outcomes.

There are two specific exceptions to DHS's agreement to join and file motions to reopen for Removal Order Class Members:

- 1) if the individual is (or was) deportable on security or terrorism grounds or
- 2) if DHS determines that the person does not qualify for a joint motion to reopen because he/she received the required safeguards.

In the event that DHS refuses to file a joint motion to reopen, a Removal Order Class Member has the ability to file a motion to reopen unilaterally.¹⁴ *Franco* also details specific procedures regarding unilateral filing of a motion to reopen. Under the agreement, to file a motion unilaterally an individual must demonstrate that he or she:

- a) meets the newly- narrowed Main Class membership criteria,
- b) was not represented at the time the removal order was entered, and
- c) has a plausible defense to removability or plausible grounds for relief.¹⁵

DHS may oppose a unilaterally filed motion to reopen, but only on the basis of a few limited grounds. First, DHS may oppose the motion if the individual does not currently or did not at the time the order of removal was entered, meet the class definition. Secondly, the motion may be opposed on the basis that the individual has already been afforded the required procedural safeguards. Third, DHS may oppose if reopening would be futile because the individual is removable and ineligible for relief. Lastly, DHS may oppose if the Removal Order Class Member is inadmissible or deportable on terrorism or security-related grounds.¹⁶

In cases in which the Immigration Judge or the Board of Immigration Appeals denies on the basis of futility alone [the third ground above], DHS must notify the Plaintiffs' attorneys, and provide the attorneys with the name of the individual who filed the motion, a copy of the motion, a copy of the order, a copy of DHS's filing in opposition, and the (redacted) "A file." The Plaintiffs' attorneys may provide DHS with arguments or evidence to support a plausible defense to removability or possible grounds for relief. DHS then must review the arguments and evidence to consider a joint motion to reopen. If DHS

¹³ *Agreement* at 15-16.

¹⁴ *Id.* at 15-16.

¹⁵ *Id.* at 17-18.

¹⁶ *Id.* at 18.

chooses not to join, the plaintiffs are allowed one additional motion to reopen.¹⁷ This motion *must be filed within 90 days of the date that DHS advises the Plaintiffs' attorney that it will not join the motion.*¹⁸ As discussed more specifically below, other general numerical and time limitations that apply to motions to reopen and reconsider do not apply in this setting.¹⁹

There are other important procedural mechanisms addressed in the settlement agreement. In many other circumstances, various procedural conditions, time limits, etc., must be met before a motion to reopen may even be considered.²⁰ However, the settlement agreement makes clear that it governs these sorts of motions to reopen with its own set of procedures that are separate from the normal rules. These special procedures neither limit nor replace the procedures for reopening a case that are already available under the INA and accompanying regulations.²¹ The first motion submitted pursuant to the agreement is thus not subject to the normal time and numerical limitations because the court's order equitably tolls these filing requirements. A subsequent joint motion to reopen or to reconsider filed pursuant to this agreement also is not subject to the numerical and time limitations set forth in the INA and its implementing regulations. Once again, the court's order equitably tolls filing requirements.

Most importantly, as discussed more fully below, for those individuals who have already been removed from the United States, absent contrary circuit law, the departure bar contained at 8 C.F.R. §§ 1003.2(d) and 10003.23(b)(1) *does not prevent an Immigration Judge or the Board of Immigration Appeals from adjudicating a Removal Order Class Member's motion to reopen.*²² This may be crucially important for a person who has been wrongly removed.

(V) THE IMPLICATIONS OF FRANCO: POST-REMOVAL PROTECTIONS FOR MENTALLY INCOMPETENT DEPORTEES

a. Deportees Who Qualify for Protections under the *Franco* Reopening Agreement

As discussed above, certain individuals are entitled to special motion to reopen procedures as Removal Order Class Members under *Franco*.²³ The agreement includes protections that are particularly relevant to individuals who have been removed from the U.S. First, the departure bars at 8 C.F.R. §§ 1003.2(d) and 10003.23(b)(1) do not prevent an Immigration Judge or the Board of Immigration Appeals from adjudicating a Removal Order Class Member's motion to reopen, except in circumstances when the circuit law dictates otherwise.²⁴ Secondly, if a motion to reopen is granted, DHS will take reasonable steps to facilitate the return of a Removal Order Class Member.²⁵

i. Facilitated Return

The settlement agreement sets out the procedure by which the Removal Order Class Member's return will be facilitated in two parts: First, the government will process paperwork and coordinate amongst various agencies to assist the individual in returning to the United States. Immigration and Customs Enforcement (ICE) will review and process necessary paperwork, coordinate with the Department of

¹⁷ *Id.* at 19-20.

¹⁸ *Id.* at 20.

¹⁹ *Id.*

²⁰ See 8 C.F.R. §§ 1003.2, 1003.23 (setting forth the procedural requirements for filing motions to reopen and reconsider before the Immigration Court and the Board of Immigration Appeals).

²¹ *Id.* at 27.

²² *Id.* at 22.

²³ See discussion *supra* Part II.c.ii.

²⁴ Agreement at 15-16.

²⁵ *Id.* at 22.

State to obtain a transportation/boarding letter, and work with Customs and Border Protection (CBP) to assist in the noncitizen's physical re-entry to the U.S.²⁶

Secondly, the government will pay for the individual's travel expenses if the individual resides more than 100 miles away by land from a port of entry.²⁷ The individual is not entitled to choose a time or mode of transportation.²⁸ With these limitations, ICE has agreed to pay for all Post-Injunction Removal Order Class Members (i.e., those who received removal orders on or after April 23, 2013) and Private Agreement Removal Order Class Members whose joint motions to reopen are granted.²⁹ Other individuals whose motions to reopen are granted pursuant to the agreement will face additional hurdles because ICE has only agreed to pay for travel expenses for the first 100 Removal Order Class Members who fall into this second category.³⁰ This second category includes those who received a removal order on or after November 21, 2011, but before April 23, 2013, and individuals who filed unilateral motions to reopen pursuant to the *Franco* Reopening Agreement.

ii. What happens after returning to the United States?

Upon arrival to the United States, the individual will resume the same immigration status, if any, that he or she had before receiving a removal order. Thus, the return to the U.S does not confer any new benefit, nor does it bestow any new disability.³¹ An individual—together with counsel—must therefore carefully evaluate the consequences of return, as it may include detention and being placed, once again, in removal proceedings. For example, the agreement explains that an individual who returns pursuant to the *Franco* Reopening Agreement who was present without admission or parole before receiving a removal order will not be considered to be “paroled” for purposes of adjustment of status after her return. Under such logic, an advocate might argue that a Removal Order Class Member who was not inadmissible for unlawful presence or due to a prior removal or deportation before receiving a removal order would not be inadmissible on those grounds following her return.

To reiterate, despite the helpful measures to facilitate return as set out in the agreement, *the government reserves the right to detain the individual upon his or her return to the U.S.*³² The individual has the right to request a new custody determination, request bond or release from detention, or challenge the detention conditions as permitted by applicable laws and regulations.³³ For those Removal Order Class Members detained before the entry of a final order of removal and the individual's removal from the United States, ICE has agreed that the previous removal will not constitute a break in custody for purposes of opposing a request for a bond redetermination hearing.³⁴

In circumstances in which a returned class member is not detained upon arrival to the U.S, but fails to appear at a scheduled hearing, the individual may be detained again and the failure to appear will be considered clear and convincing evidence that the person is a flight risk.³⁵ However, the person will not

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 24.

³² *Id.*

³³ *Id.* at 24-25.

³⁴ *Id.* at 25.

³⁵ *Id.*

be ordered removed *in absentia* unless or until the person is represented in immigration proceedings or determined to be mentally competent by an Immigration Judge before the failure to appear.³⁶

b. Limitations of the agreement

As noted, one huge limitation of the *Franco* agreement is that it only applies to individuals who were detained in Arizona, Washington, or California during the relevant time period. However, those individuals who do not fall within these situations may still use *Franco* by analogy to pursue motions to reopen proceedings and to return to the U.S.³⁷ The closer cases adhere to the *Franco* model, the higher the likelihood of success, as the case stands as a successful example of advocacy. To be sure, such cases are always complex and governed by varying standards. For example, in order to determine that a noncitizen is being wrongfully removed or was previously removed due to an unrecognized lack of competency, the BIA has looked for those “who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves...”³⁸ In *Franco*, some of the individuals who were able to file a joint motion to re-open (not the only relief authorized by *Franco*) had to “submit evidence that they were determined to be incompetent by any administrative or judicial tribunal in the United States within the three years preceding the date they had the final order of removal entered in their proceeding.”³⁹

Other limitations to consider include time constraints and the very specific class definitions. Additionally, the protections set forth in the settlement agreement, including the provision of a Qualified Representative to provide legal representation, may not be sufficient for many individuals suffering from mental illness.⁴⁰ Successfully reopening proceedings and bringing a noncitizen struggling with mental illness may also depend on coordination with and cooperation from many federal agencies, including the Department of Homeland Security. Advocates may encounter difficulties as these large federal agencies work to implement this complex agreement.

(VI) CONCLUSION

It is striking that DHS was willing to cooperate with advocates assisting individuals with mental illnesses who met the complicated class qualifications discussed in this Advisory. Before *Franco*, successfully reopening a case for these (and similarly situated) individuals was a much more difficult proposition. Now, with *Franco* as an inspiration and an example, the ability of advocates to correct fundamentally unfair procedures and bring back those who were wrongfully deported is greatly enhanced.

³⁶ *Id.*

³⁷ It may be possible to ask DHS to join in motions on the basis that the client is similar to the *Franco* class members. Alternatively, one could attempt to file a class action in another court arguing the same thing. Please refer to the previous practice advisory for more options: *Mentally Incompetent But Deported Anyway: Strategies for Helping a Mentally Ill Client Return to the United States* (September 2015).

³⁸ Agreement at 2.

³⁹ *Franco* at 14-15.

⁴⁰ Fatma E. Marouf, *Incompetent but Deportable: The Case for A Right to Mental Competence in Removal Proceedings*, 65 *Hastings L.J.* 929 (2014).