Authorities must rethink deportation

Circuit sides with trial court that rampant disease in prison may be considered torture

By John Roemer
Daily Journal Staff Writer

The 9th U.S. Circuit Court of Appeals ordered immigration authorities to reconsider a negative ruling on a man slated for deportation to Haiti despite claims of life-threatening conditions in cholera-ridden prisons that amount to torture.

A Lancaster immigration judge blocked the deportation of a lawful permanent U.S. resident on those grounds, only to be reversed by the Board of Immigration Appeals. A 9th Circuit panel faulted the BIA's decision and sent the case back for reconsideration. *Ridore v. Holder*, 2012 DJDAR 13723.

Lawyers said the ruling was a potential win for hundreds in the same fix because it cautioned immigration authorities to use care in applying a 2002 BIA precedent that shut the door to deportees to Haiti claiming protection under the United Nations' Convention Against Torture, an international standard the U.S. has recognized since 1988.

Deportees to Haiti are detained indefinitely in overcrowded prisons under brutal conditions, evidence in the case showed. The Haitian embassy in Washington, D.C., did not respond to a request for comment on the opinion.

Jean Baptiste Ridore was admitted to the U.S. from Haiti as a lawful permanent resident at age 12 in 1973. His father, sister and brother are U.S. citizens. When he was 21 his mother and grandmother were killed. He found their murdered bodies in their home.

> 'The BIA cannot … override or disregard evidence in the record and substitute its own version of reality.'
>
> — *Circuit Judge Raymond C. Fisher*

Between 1991 and 2004, Ridore committed a string of petty offenses that led federal authorities to open deportation proceedings. He appeared before U.S. Immigration Judge William J. Nickerson Jr. and brought on an expert witness, Michelle Karshan, the founder of an organization that aids criminal deportees to Haiti.

After hearing testimony and studying background material, including the U.S. State Department's 2004 country report on Haiti, Nickerson concluded that criminal deportees to Haiti are confined indefinitely in inhumane conditions with little food or water that are "almost the equivalent to a death warrant" where "disease is so rampant" that the situation suffered by inmates "can only be described as acts of torture."

The judge wrote that the definition of torture includes both severe pain and severe suffering. Malnutrition and disease clearly involve severe suffering, so the definition is met, he concluded.

The panel, in an opinion by Circuit Judge Raymond C. Fisher, held that the Board of Immigration Appeals committed legal error by disregarding Nickerson's fact-based findings, vacating his decision and engaging in its own factfinding.

Nickerson ruled that Ridore's case was different and not controlled by *In re J-E-,* 23 I&N Dec. 291 (BIA 2002), which rejected a similar claim for Convention Against Torture protection based on the conditions criminal deportees allegedly face in Haitian prisons. But the BIA merely restated its conclusions from that case in overruling Nickerson's decision.

"The BIA's flawed approach impeaches its conclusions on several key issues," Fisher wrote for colleagues Johnnie B. Rawlinson and U.S. District Judge George H. Wu of Los Angeles, sitting by designation. Among the BIA's errors, Fisher wrote, was its statement that "while we acknowledge that prison conditions in Haiti appear to have deteriorated" since *In re J-E-*, "that does not undermine the rationale of our decision."

Wrote Fisher, "The BIA cannot … override or disregard evidence in the record and substitute its own version of reality."

Immigrant advocates cheered. Karshan, whose Alternative Chance program for Haitian criminal deportees backed Ridore, predicted the opinion "will enable immigration judges to find the likelihood to torture instead of being bound by *In re J-E-,* a misinformed, outdated decision with an unfairly high bar for deportees seeking relief. It's been a thorn in our side for years."

Charles Miller, a spokesman for the U.S. Department of Justice, which defended the BIA's decision, declined comment.

Ridore's appellate lawyer, Kari Elisabeth Hong, who teaches at Boston College Law School and operates "virtual" law offices in California and Oregon, said it is significant that "the court cautioned the BIA against using *In re J-E-* as a blanket decision denying relief to all potential deportees to Haiti."

Hong also praised Nickerson's original opinion in Ridore's favor. "Judge Nickerson is very well regarded by the immigration bar," she said. "His opinion was exceedingly thoughtful and careful."

john_roemer@dailyjournal.com

Samsung targets juror in request for retrial

By Rachel Swan
Daily Journal Staff Writer

Samsung Electronics Co. Ltd. is attacking the jury foreman in an effort to persuade a judge to grant a new trial against Apple Inc., arguing the patent and trade dress infringement verdict should be tossed out due to juror misconduct.

But legal observers say Samsung's attorneys at Quinn Emanuel Urquhart & Sullivan LLP are likely to have a tough time persuading U.S. District Judge Lucy H. Koh to reverse a victory for Apple and its attorneys at Morrison & Foerster LLP.

> 'I would call it a long shot but not quite a Hail Mary pass.'
>
> — *Rodney R. Sweetland III*

The San Jose jury awarded the Cupertino-based consumer technology giant $1 billion in damages, and Apple is seeking permanent injunctions against several Samsung tablets and smartphones based on the verdict.

Quinn Emanuel attorneys argue in a motion unsealed late Tuesday that jury foreman Velvin Hogan was unfit to serve because he failed to disclose a 1993 lawsuit with Seagate Technology Inc., a company in which Samsung is a major shareholder.

Hogan is a former employee of Seagate, Samsung noted in its filing, and the suit forced him to file for personal bankruptcy.

"I would call it a long shot but not quite a Hail Mary pass," said Rodney R. Sweetland III, a partner specializing in intellectual property at Duane Morris LLP who is not involved in the case.

In September, Quinn Emanuel filed a motion for judgment as a matter of law and a new trial but asked to keep the misconduct charge under seal. Koh denied the company's request and released the filing to the public. *Apple Inc. v. Samsung Electronics Co. Ltd.*, CV 11-1846 (N.D. Cal., filed April 15, 2011).

Sweetland said Wednesday that Samsung's argument seems dubious, not only because the Seagate lawsuit happened decades ago, but because in most civil cases it's virtually impossible to override a decision with a misconduct charge. He said Hogan's alleged misstep seems "comparatively innocent."

Still, Hogan's high profile may prompt the judge to take Samsung's claims more seriously, he said.

"The foreperson really was overly and unusually involved in this case," Sweetland added.

Samsung's juror misconduct claim takes up only two pages of Quinn Emanuel's post-trial motion, which runs more than 40 pages. Company spokeswoman Rachel Quinlan declined to comment.

Koh is scheduled to consider post-trial motions by Apple and Samsung in December.

rachel_swan@dailyjournal.com

State Supreme court debates picket lines

Justices seek way to avoid sweeping ruling on landowners' rights in Ralphs union case

By Laura Hautala and Emily Green
Daily Journal Staff Writers

DAVIS — State Supreme Court justices wrestled Wednesday with whether Ralphs Grocery Co.'s property rights should trump a union's right to picket on the sidewalk outside a store.

During the oral arguments held at UC Davis School of Law, the justices appeared ready to overturn a lower appellate court decision prohibiting the union from picketing. But they also searched for ways to avoid a sweeping ruling that would render two California statutes unconstitutional.

The case deals with questions arising from a 2007 labor dispute at a Sacramento grocery store owned by Ralphs. As union protesters formed a picket line and distributed leaflets outside the store, Ralphs sought an injunction to prevent organizers from using the sidewalk. *Ralphs Grocery v. United Food & Commercial Workers Union*, S185544.

A trial court rejected the injunction, but the 3rd District Court of Appeal ruled that two state statutes — one prohibiting injunctions on some labor protests and one establishing rules for issuing such injunctions — violated property owners' First Amendment rights by forcing them to host a protest that presented a message that wasn't their own.

During the discussion, Chief Justice Tani G. Cantil-Sakauye made it clear she thought the state statutes were constitutional.

"They don't directly constrict or inhibit any kinds of speech," Cantil-Sakauye said. "It regulates conduct."

When counsel for Ralphs, Miriam A. Vogel of Morrison & Foerster LLP, told the court it should overturn these statutes, as well as precedents based on them from as far back as the 1970s, the justices balked.

"Do you want a pony for the holidays, too?" asked Associate Justice Carol A. Corrigan.

Vogel presented two positions during Wednesday's arguments: that the sidewalk outside the grocery store is not a public forum, and that the appellate court was right in its finding the two statutes were unconstitutional. Her fallback position was that unions might be allowed to protest, but are still subject to limitations placed by the grocery store.

> 'They don't directly constrict or inhibit any kinds of speech. It regulates conduct.'
>
> — *Chief Justice Tani G. Cantil-Sakauye*

The justices focused on what kind of restrictions could be allowed on labor protests, seeming to agree the picketers could not go inside the store. But they appeared to chafe at other restrictions Ralphs had made on the original protest, such as limiting the number of picketers allowed and forbidding them from protesting during the week leading up to Martin Luther King Jr. Day and other holidays.

While Justice Goodwin Liu questioned how a court could accomodate the store's commercial interests when issuing an injunction against a labor protest, Vogel didn't provide a specific test for judges to use.

However, Associate Justice Marvin R. Baxter said Ralphs might have more rights than the union protesters do, because their property rights are drawn from the Fifth Amendment, while picketers rely on state and federal statutes.

Paul L. More of Davis, Cowell & Bowe LLP argued for the union that the sidewalk was in fact a public forum. He and the court seemed to disagree about whether that matter is settled law. Over and over, the justices threw him hypotheticals, asking whether the unions would still have a right to picket even if the sidewalk was not a public forum.

Associate Justice Joyce L. Kennard may have foreshadowed the court's thinking with a question near the end of the arguments.

"Assume the court were to decide there is no need to address the [public forum] issue," she asked More. "Would you still take that win?"

"The answer to that question," More said, "is yes."

laura_hautala@dailyjournal.com
emily_green@dailyjournal.com

Lawyer wants sex charge dismissed against teacher

An attorney for a former Modesto high school teacher who began a high-profile romance with a teenage student asked a judge to dismiss a sex charge against her client involving another person.

James Hooker, 42, is facing one count of oral copulation with a person under 18 in connection with an alleged 1998 encounter.

His attorney, Mary Lynn Belsher, argued during a hearing on Tuesday that the charge should be dismissed, saying the statute of limitations has expired, the Modesto Bee reported.

A Stanislaus County judge is expected to rule on that request on Oct. 23. The preliminary hearing was delayed, although the alleged victim did testify.

Hooker made national headlines earlier this year when he left his family and job to move in with his former student at Modesto's James Enochs High School, 18-year-old Jordan Powers.

Hooker and Powers insisted on talk shows and during news interviews that they did not have any sexual contact until Powers turned 18.

Police investigated that claim and say they uncovered Hooker's separate 1998 relationship with a girl who was then 17.

Now 31, the person testified that she and Hooker met at a conference when she was a student at a Modesto high school and he was a business teacher at another school in the city.

—Associated Press

Adding up the true costs of lateral partner buy-ins

By Edwin Reeser

One of the great marketing campaigns of the late '70s and early '80s was for a set of kitchen knives creatively pitched as "the amazing Ginsu knife." They sold an estimated 3 million sets in six years, for a product that purchasers acknowledged they really didn't need. Nobody ever actually said the product came from Japan, and it didn't. We just assumed with a name like "Ginsu," it must have come from Japan, rather than Fremont, Ohio.

FIRST IN A TWO PART SERIES

The pitch was driven home with the now famous lines "How much would you pay? Don't answer!", "Call now! Operators are standing by!" and everyone's favorite "But wait! There's more!"

It shouldn't come as a shock in the wake of Dewey & LeBouef's spectacular financial collapse that law firms active in the lateral hiring market want to distinguish themselves from Dewey both for attracting potential lateral partner candidates and for retaining the partners they already have. Both classes are uneasy about one significant element that played a role in Dewey's demise: aggressive lateral partner hiring.

One popular method of distancing one's firm from Dewey is, while acknowledging that aggressive lateral hiring is a shared strategy, that (a) our firm does lateral hiring better than Dewey because we aren't giving out guaranteed contracts, and (b) we have larger capital requirements and little or no debt. One might just as well be saying that it cannot happen here because people at Dewey chewed gum, and that just isn't done around here.

Let's review together one method of how a rolling capital account contribution program works. Let's explore just a couple of iterations as exercises from which you can then draw your own conclusions. Use the numbers that are real for you and your firm in substitution of the general examples below if that helps you more.

Start with a basic capital account requirement that is reasonably typical for a large law firm, at 35 percent of targeted compensation. (Dewey used 36 percent, but you can adjust this to anywhere from 25 percent to 40 percent as a baseline.) Set the initial buy-in below the market competitive requirement at only 30 percent. That starts off being a better deal than the firm across the street asking for 35 percent doesn't it?

Then build in an additional annual contribution to capital for anywhere from four to 10 years, taking the fully funded capital account for equity partners to somewhere between 55 percent and 70 percent of targeted compensation. We will use a simple example of 60 percent as our hypothetical law firm's targeted capital, to be contributed over six years. The amount of capital required as of the first day of admission to the partnership, which we will set at Jan. 1, is 30 percent. Thereafter, each year for six consecutive years, the partner has to add 5 percent more of their targeted compensation. This would start at the beginning of year two in the partnership, with the payment funded by the partner's year-end share of distributions from the prior year's profit.

Assume the partner is a $700k targeted compensation partner — a half million dollars below PPP as the firm reports it to AmLaw at roughly $1.2 million. (You can pick any number you want to apply the ratios but this would be a good number to use for a successful mid-level candidate.) That means the initial capital contribution for this hypothetical partner is $210k. Assume that the initial equity contribution is all cash provided by a bank loan with an industry typical five-year level payment principal reduction program, payable each January with the partner's distribution following the year end.

Next January, if the partner stays where she is on the targeted compensation scale, she contributes $35k based on the 5 percent per year program. That is closer to $70k in pretax dollars at marginal federal and state income tax rates. Effectively that means whatever her nominal compensation, the firm is requiring 10 percent off the top for the next six years to fund the rolling 5 percent capital contribution commitment. There is nothing untoward about the program, and everyone joining should know before they join how that works.

> 'It shouldn't come as a shock in the wake of Dewey & LeBouef's spectacular financial collapse that law firms active in the lateral hiring market want to distinguish themselves from Dewey.'

How much would you pay to be in this firm? Don't answer!

She also needs to understand that if she takes out a five-year term loan from the bank to fund the initial $210k, she needs to pay back $42k every year — approximately $84k in pretax dollars. So, bottom line, take $154k off the top of her scheduled $700k income every year for the next five years to see what she receives as distributable. (That is $546k for those who use their fingers to count.) At the end of the five years, only *then* does she you get to receive her full targeted income of $700k. (Actually, she still owes one more installment of 5 percent at the end of year six, but at least the bank loan is paid off. Maybe.)

If you are a partner making as much as reported PPP, the numbers are $360k initially on admission, $60k every year in after tax money (or $120k pretax money) for five years, and loan principal reductions against the initial buy-in of $72k each year (or $144k pretax money). So take $264k off the targeted compensation for the first five years and the real figure is $1,056,000.

But wait, there is more!

Let's look at the situation where your income is not static, but you get a "raise" in target compensation. From $700k to $800k, starting with year three. Immediately you should be expected to raise your "base" capital from $210k to $240k (30 percent of $800k). How the firm mechanically addresses that scenario can vary, but law firms can require full satisfaction of the "base level" capital if you take the raise. So you come out of pocket, or the money is subtracted from your previous year end distribution, or you borrow it from the bank.

But wait, there is more!

Now your annual 5 percent per year increase goes up to $40k from $35k. So you come out of pocket $30k that first year for the privilege of the $100k raise. But that is not the end of it. You have two "back years" to make up now as well. Presumably that will be handled by a "true up" contribution, but it could be "financed" by the firm in any number of other ways as well. That is a total of $10k. ($20k pretax). So, assuming you have to catch up starting in year three, almost the entire amount of the raise ($80k pretax) in the first year does not touch your pocket.

The firm nominally gives you a "raise," but by "financing" it interest free the firm actually pays very little of it to you. They make an entry on the books at the end/beginning of each year, but don't need the cash on hand to support all of it. A big chunk of that money goes in a "circle" — the payout is booked as a distribution (taxable income to our partner) and the payback is booked as a capital contribution. $100k cash moves off the left side of the balance sheet, and the equity side is reduced by a distribution to the partner. But then $40k moves back on the balance sheet as cash, and $40k is additional equity as paid in capital. Of the net $60 received, after tax she keeps $10k. Your option as a partner to maintain more of the cash distributable to you next year is to go to the bank and write a check to the firm — up front before the year. The bottom line effect is the same: cash does go out and reduces the equity, but then the loan funds the capital contribution and the equity is restored, and cash is in the bank and back on the left side of the balance sheet! Our partner terms out the loan over five years, setting up a rhythm of ever present personal bank loans. Like when she gets another "raise" in year five!

Edwin B. Reeser *is a business lawyer in Pasadena specializing in structuring, negotiating and documenting complex real estate and business transactions for international and domestic corporations and individuals. He has served on the executive committees and as an office managing partner of firms ranging from 25 to over 800 lawyers in size.*