

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JULIAN YEBOAH, :  
Plaintiff :  
 :  
v. : Civ. No. 01-CV-3337  
 :  
IMMIGRATION AND NATURALIZATION :  
SERVICE AND CHARLES W. SEMSKI, :  
District Director, Immigration and :  
Naturalization Service, :  
Defendants. :

OPINION AND ORDER

Van Antwerpen, J.

October 26, 2001

I. INTRODUCTION

On March 4, 2000, the Immigration and Naturalization Service (“INS”) found Julian Yeboah (“Yeboah”), an eleven-year-old boy from the Republic of Ghana, at John F. Kennedy Airport in New York City. Yeboah had apparently arrived on an airplane flight from Ghana and was alone, without parents or a guardian and without other relatives or friends, and without any travel documents. He has since been in the custody of the INS.

After the INS initiated removal proceedings to return Yeboah to Ghana, Yeboah requested that the Attorney General consent to a state juvenile court dependency hearing to allow the plaintiff to qualify for Special Immigration Juvenile (“SIJ”) status under Section 101(a)(27)(J) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J). If the state court held such a proceeding and, under the statute, (1) declared Yeboah dependent and determined that he is eligible for long-term foster care as a result of abuse, abandonment or neglect and (2) concluded that it would not be in Yeboah’s best interest to return to Ghana, Yeboah would qualify for SIJ status and could remain in the United States. A state court may

hold a dependency proceeding only with INS consent. INS District Director Charles Zemski (“Zemski”) refused to consent to the state juvenile court’s holding a dependency proceeding.

Yeboah seeks declaratory and injunctive relief. The first count of Yeboah’s amended complaint asks the Court to review Zemski’s decision under section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. The second count asks the Court for injunctive relief mandating that the INS consent to have a state juvenile court conduct dependency proceedings under 8 U.S.C. § 1101(a)(27)(J). Defendants have filed a motion to dismiss Yeboah’s complaint, arguing that the decision to consent to a state juvenile court’s jurisdiction to conduct a dependency hearing is in the exclusive discretion of the Attorney General and is not subject to judicial review; defendants allege that pursuant to Federal Rule of Civil Procedure 12(b)(1), the Court lacks subject matter jurisdiction over the complaint.

## II. DISCUSSION

### A. Immigration and Nationality Act - Special Immigration Status

Section 101(a)(27)(J) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J), provides that an immigrant who is present in the United States qualifies for SIJ status if (1) a state juvenile court declares the individual dependent and determines that the individual is eligible for long-term foster care due to abuse, neglect or abandonment; (2) it is determined in administrative or judicial proceedings that it would not be in the individual’s best interest to be returned to the individual’s or parent’s previous country of nationality or country of last habitual residence and (3) the Attorney General “expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status.” 8 U.S.C. § 1101(a)(27)(J). With respect to this requirement of consent by the Attorney General, the statute further provides that

“no juvenile court has jurisdiction to determine the custody status or placement of an alien in actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.” Id. In other words, the Attorney General’s consent is a precondition to the dependency proceeding. It is this third requirement of consent that is at issue in this case. Yeboah challenges the Attorney General’s denial of consent under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq. Defendants argue that the decision to give consent is not subject to judicial review under the APA.

B. Review of Agency Decisions under the Administrative Procedure Act

1. General Framework of the Administrative Procedure Act

The APA provides for comprehensive judicial review of agency actions. As the Supreme Court has noted, “[a]ny person adversely affected or aggrieved by agency action ... is entitled to judicial review thereof, as long as the action is a final agency action for which there is no other adequate remedy in a court.” Heckler v. Chaney, 470 U.S. 821, 828, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (internal quotations and citations omitted).<sup>1</sup> However, in order for an aggrieved person to, as Yeboah attempts here, seek judicial review of agency action to set aside “agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,” 5 U.S.C. § 706(2)(A), the party must first overcome the hurdle of Section 701(a) of the APA. Section 701(a) delineates two situations in which judicial review is precluded. Judicial review is barred where (1) “statutes specifically preclude

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<sup>1</sup> Yeboah is clearly the party aggrieved by the INS’s decision. Additionally, a decision by the Attorney General is considered “agency action” under the APA. See Banzhaf v. Smith, 737 F.2d 1167, 1168 (D.C. Cir. 1984) (“Final actions of the Attorney General fall within the definition of agency action reviewable under the APA.”) Finally, the Attorney General’s decision to withhold consent here is final.

judicial review” and (2) “agency action is committed to agency discretion by law.” 5 U.S.C. 701(a)(1) and (2); see also Heckler, 470 U.S. at 828.

2. “Statutes Specifically Preclude Judicial Review” Exception

The first exception is relatively easy in application; it applies when Congress “has expressed an intent to preclude judicial review” and “requires construction of the substantive statute involved to determine whether Congress intended to preclude judicial review of certain decisions.” Heckler, 470 U.S. at 828-30. The parties agree that Section 701(a)(1), which bars review where Congress has expressed an intent to bar judicial review, does not apply in this case.

3. “Committed to Agency Discretion by Law” Exception

Rather, defendants argue under the second exception that judicial review is precluded in this case because the Attorney General’s decision to withhold consent is “agency action ... committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). Application of the second exception is more involved. The Supreme Court has remarked that the “committed to agency discretion” exception to judicial review found in Section 701(a)(2) is a “very narrow exception.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Section 701(a)(2) establishes a broad presumption in favor of reviewability; Section 701(a)(2)’s bar against judicial review has been interpreted to apply only “in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.” Id.; Davis Enterprises. v. United States Env’tl. Prot. Agency, 877 F.2d 1181, 1184-85 (3d Cir. 1989). In other words, “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” Heckler, 470 U.S. at 830; see also Davis Enterprises, 877 F.2d at 1185 (interpreting Heckler as not changing

the presumption of reviewability of agency action under the APA). “In such a case, the statute ... can be taken to have ‘committed’ the decisionmaking to the agency’s judgment absolutely.” *Id.*

“[A]gency action may be determined to be ‘committed to agency discretion by law’ only when a fair appraisal of the entire legislative scheme ... persuasively indicates that judicial review should be circumscribed.” Hondros v. United States Civil Serv. Comm’n, 720 F.2d 278, 293 (3d Cir. 1983). Courts determining whether Congress precluded all judicial review consider not only the statutory language, but also its legislative history and any relevant public policy considerations. Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 159, 173, 90 S.Ct. 838, 25 L.Ed.2d 192 (1970); see also Am. Disabled Attendant Programs Today v. United States Dep’t of Hous. and Urban Dev., No. CIV.A.96-5881, 1998 WL 113802, at \*2 (E.D.Pa. March 21, 1998) (“Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.”)

C. Analysis of Consent Requirement Under the “Committed to Agency Discretion by Law” Exception

1. Legislative History of Consent Requirement

An examination of the legislative history reveals that the purpose behind the consent requirement was “to limit the beneficiaries of [the SIJ ] provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children.” H.R. REP. NO. 104-405 at 130 (1997). This consent requirement seeks to achieve this by “requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of

the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.” *Id.* This excerpt suggests that the purpose of the consent requirement was not to provide the Attorney General with boundless discretion, but rather to implement a check in order to insure that individuals were not seeking SIJ status for improper purposes.<sup>2</sup>

2. The Local 2855 Factors

In Local 2855, AFGA (AFL-CIO) v. United States, 602 F.2d 574 (3d Cir. 1979), the Third Circuit delineated three criteria courts are to consider when deciding whether agency action is reviewable. “First, as a predicate to nonreviewability, the agency must have broad discretionary powers.” Hondros, 729 F.2d at 293 (internal quotations and citations omitted). This means that there is no law to apply, not merely that statutes use the word “may” or other words of discretion. *Id.* Second, courts are to consider whether the action implicates “political, military, economic, or other choices not essentially legal in nature...” and, thus, whether the action is not readily susceptible to judicial review. *Id.* Third, even actions “committed to agency discretion by law” are reviewable on grounds that the agency lacked jurisdiction, that the agency’s decision “was occasioned by impermissible influences” or that the decision “violates any constitutional, statutory, or regulatory command.” *Id.*

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<sup>2</sup>We note Yeboah’s argument that this history can be read to state a standard by which a court could measure whether the Attorney General, in refusing consent in a particular case, abused his discretion. Yeboah suggests that the court could review whether Director Zemski determined that the dependency order was being sought for the purpose of obtaining relief from abuse or neglect or for some other, improper purpose and, if so, whether the determination was arbitrary and capricious. Pls.’ Brief at 8. Whether the legislative history, discussed supra at 5-6, simply explains the purpose of the consent provision or actually offers a legal standard is unclear. We do not decide this issue for the purposes of this motion.

As discussed above, the analysis under the first factor into whether an agency has broad discretionary powers entails an inquiry into whether the statute is so broad that there is no law to apply. The Third Circuit has held that an agency's decision may be reviewable if there are internal agency policies, procedures and regulations that can serve as law to be applied, or a standard against which to judge the exercise of agency discretion. Chong v. Director, United States Information Agency, 821 F.2d 171 (3d Cir. 1987). In Chong, a nonimmigrant exchange visitor, who pursued graduate medical training in the United States, applied for a waiver of the requirement that a nonimmigrant exchange visitor reside abroad for two years after spending time in the Exchange Visitor Program before becoming eligible for immigrant visa or permanent residence. The United States Information Agency ("USIA") declined to make a favorable recommendation, and the INS District Director denied the waiver based on the USIA's refusal to issue a favorable recommendation. The applicant filed a complaint challenging the USIA's denial of a recommendation and the district court dismissed the complaint for lack of subject matter jurisdiction.

The Court of Appeals reversed, finding that the court did have jurisdiction to review the USIA's denial. The court first observed that "[the] statutory language alone provide[d] no guidance to the USIA on how to decide its recommendations, and likewise set forth no standards against which a court may judge whether the USIA abused its discretion."<sup>3</sup> Chong, 821 F.2d at 175-76. The court noted that "the USIA itself, however, has adopted regulations delineating the procedure it must use to review waiver requests." Id. at 176. These regulations required the INS

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<sup>3</sup>The statute in question provided that "upon the favorable recommendation of the Director of the United States Information Agency, ... the Attorney General may grant a waiver of the two-year foreign residency requirement."

“to submit its findings of hardship ‘together with a summary of the details of the expected hardship ... to the Waiver Review Branch’ of the USIA for the Director’s recommendation.” Id. The regulations further provided that “[u]pon receipt of a request for a recommendation of waiver ... the Director will review the policy, program, and foreign relations aspects of the case and will transmit a recommendation to the Attorney General for decision.” Id. The court held that “these regulations provide sufficient guidance to make possible judicial review under an abuse of discretion standard.” Id.<sup>4</sup>

The Third Circuit has since applied the principles of Chong to other agency decisions and their corresponding regulations. For example, the court in Davis Enterprises v. United States Environmental Protection Agency, 877 F.2d 1181 (3d Cir. 1989) held that a decision on the part of the Environmental Protection Agency (“EPA”) not to allow its employee to testify at a deposition during the workday regarding results of an oil pollution test he had performed on behalf of the EPA was subject to judicial review. The court held that the EPA regulations on voluntary employee testimony provided sufficient guidance for judicial review. The EPA regulations required the agency to consider whether allowing an employee to testify in a given case is in the agency’s interest and listed several factors the EPA is to consider, including the appearance of taking sides and the effect on agency resources. Davis Enterprises, 877 F.2d at

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<sup>4</sup>The court in Chong acknowledged that other circuit courts had come to the opposite conclusion regarding the very same regulations. See e.g., Abdelhamid v. Ilchert, 774 F.2d 1477, 1450 (9<sup>th</sup> Cir. 1985) (commenting that “this regulation raises no legal issues for review”); Dina v. Attorney General, 793 F.2d 473, 477 (2d Cir. 1986). The Third Circuit expressed its disagreement with these decisions. We note that other circuits have since aligned with the Ninth and Second Circuits with respect to the regulations regarding the waiver recommendation. See, e.g., Korvah v. Brown, 66 F.3d 809 (6<sup>th</sup> Cir. 1996); Singh v. Moyer, 867 F.2d 1035 (7<sup>th</sup> Cir. 1989) and Slyper v. Attorney General, 827 F.2s 821 (D.C.Cir. 1987). Nonetheless, we follow the principles enunciated by the Third Circuit in Chong.

1185. The court noted that these regulations were comparable to those in Chong, in that they “did not state a legal standard but merely listed the factors the agency must consider in reaching a decision.” Id. at 1186. The court reasoned that “[o]nce the agency has articulated factors to be considered in deciding requests for employee testimony, the agency effectively has limited its own discretion and would not be free to make a decision based exclusively on factors not contained in the regulations.” Id. Accordingly, the court held that the decision to prohibit the deposition during working hours was subject to judicial review.

Here, the INS has implemented its own internal procedure regarding the consent provision. The written INS procedure on district director consent provides that “a district director should consent to dependency proceedings if ‘(1) it appears that the juvenile would be eligible for SIJ status if a dependency order is issued; and, (2) in the judgment of the district director, the dependency proceeding would be in the best interest of the child.’” Pls.’ Brief at 6 (quoting INS Internal Memorandum on District Director Consent, Written by Thomas E. Cook, Acting Assistant Commissioner Adjudications Division). These two factors provide a standard against which to judge the agency’s exercise of discretion.<sup>5</sup> Like the regulations involved in Chong and Davis Enterprises, the procedure here does not necessarily state a legal standard, but does list factors the agency is to consider in making the consent decision. The existence of this internal procedure indicates that the agency’s discretion is not so broad that there is no law for a

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<sup>5</sup>We make note of the statement contained in Yeboah’s brief that this standard is at odds with the legislative history of the SIJ provision. Pls.’ Brief at 13 fn. 4. We do not decide whether the legislative history, discussed supra at 5-6, simply explains the purpose of the consent provision or actually offers a legal standard. Nor do we decide for the purposes of resolving this motion whether the regulation and legislative history are inconsistent and if so, which applies, or if they can in fact be reconciled.

reviewing court to apply.

Furthermore, the existence of this internal procedure speaks to the third of the Local 2855 factors; insofar as Yeboah's allegation is that the District Director abused his discretion in failing to follow this procedure, the agency action arguably violates regulatory commands.<sup>6</sup>

Additionally, with respect to the second criterion, while there is a political aspect to all immigration decisions, we do not think that the Attorney General's decision to withhold consent is so political in nature as to preclude judicial review.

Having reviewed the legislative history and having applied the three criteria advanced by the Third Circuit, we hold that the INS's decision to withhold consent under 8 U.S.C. § 1101(a)(27)(J) is subject to judicial review. Accordingly, we deny defendants' motion to dismiss.

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<sup>6</sup>We note that defendants argue that plaintiff is mistaken in suggesting that Director Zemski did not follow internal guidelines. Defs.' Brief at 5. However, whether the INS did or did not follow the guidelines goes to the merits and is beyond the scope of the motion to dismiss.

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IMMIGRATION AND NATURALIZATION	:	
SERVICE AND CHARLES W. SEMSKI,	:	
District Director, Immigration and	:	
Naturalization Service,	:	
Defendants.	:	

ORDER

AND NOW, this 26<sup>th</sup> day of October, 2001, upon consideration of Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Lack of Subject Matter Jurisdiction, filed on October 4, 2001, and Plaintiff's response thereto, filed on October 9, 2001, it is hereby ORDERED that Defendants' motion is DENIED.

BY THE COURT:

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United States District Judge  
Franklin S. Van Antwerpen