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COURT PERMITS ALIENS TO DELAY DEPORTATION PENDING APPEAL

***(Nken v. Holder,* No. 08-681)**

The U.S. Supreme Court this week declined to restrict the power of federal courts to delay the deportation of aliens while they appeal a removal order. The Court rejected the position of immigration officials that such delays are not permissible in the absence of clear and convincing evidence that the removal order was issued in violation of federal immigration law.

The 7-2 decision was a setback for WLF, which filed a brief in *Nken v. Holder* urging the Court to impose strict limits on stays pending appeal. But the decision contained a silver lining: the Court suggested that some appeals courts have been too free in granting appeals and indicated that a stay is improper unless the alien can demonstrate both that he is likely to prevail on his appeal and that he will suffer irreparable harm if a stay is denied. The Court further indicated that the dislocations that accompany any removal are not by themselves sufficient to constitute "irreparable harm."

WLF's brief argued that a provision of the 1996 immigration reform law, 8 U.S.C. § 1252(f)(2), imposes a strict "clear and convincing evidence" standard that must be met before a stay of deportation may properly be issued. WLF argued that Congress contemplated that in most instances an alien who seeks to fight a deportation order should return home and carry out his appeal from overseas. A majority of the Court disagreed, finding that when Congress adopted the statute, it did not intend to displace the rules normally applicable to applications for stay pending appeal.

"The federal courts are undermining the effectiveness of immigration enforcement efforts when they routinely block deportation while they are reviewing final orders of removal. The ready availability of such delays frequently permits savvy attorneys to postpone indefinitely the deportation of their alien clients," said WLF Chief Counsel Richard Samp in response to the High Court's decision. "While we are disappointed that the Court did not adopt the strict standard that we believe Congress intended, we are nonetheless pleased that the standard the Court did adopt should make it harder for aliens to obtain routine stays of removal pending appeal," Samp said.

The case before the Supreme Court involved Jean Marc Nken, a Cameroon citizen who entered the country on a temporary transit visa in 2001 and has been fighting deportation proceedings ever since. The Board of Immigration Appeals (BIA) issued a final order of removal in June 2006, rejecting Nken's claim for asylum. Since then, Nken has filed three

separate motions with the BIA to reopen removal proceedings; all three were denied. The U.S. Court of Appeals for the Fourth Circuit in Richmond has denied appeals from the first two. The appeal from denial of the third petition to reopen is still being heard, and the Fourth Circuit denied a motion to "stay" his removal while it hears this latest appeal. Nken asked the Supreme Court to "stay" his deportation until after the Fourth Circuit rules on the petition. Although the Supreme Court held that the Fourth Circuit erred in applying § 1252(f)(2)'s "clear and convincing evidence" standard, it declined to grant Nken a stay. Rather, it remanded the case to the Fourth Circuit for reconsideration of the stay motion in light of the Supreme Court's new standard. Given the federal government's position that Nken's underlying appeal is without merit, one can presume that the Obama Administration will continue to oppose the grant of a stay pending appeal.

The issue before the Court -- whether the strict standard set forth in 8 U.S.C. § 1252(f)(2) applies to motions for stay pending review -- is one that has sharply divided the federal appeals courts. The Fourth Circuit is one of two appeals courts that held that § 1252(f)(2) does, in fact, apply to motions for stay of removal pending appeal.

In its brief urging the Court to affirm the Fourth Circuit, WLF argued that the text of § 1252(f)(2) makes plain Congress's intent that stays pending appeal would be governed by the statute's strict requirements: it provides that "no court shall enjoin the removal of any alien" unless those strict requirements are met. The Court agreed with Nken that an order to "enjoin" removal is somehow different from an order to "stay" removal and thus that his motion to stay removal is not covered by § 1252(f)(2). WLF had argued in response that Congress routinely uses the words "enjoin" and "stay" interchangeably and deems a "stay" to be a subset of an "injunction." WLF also asserted that § 1252(f)(2) would be rendered meaningless if it did not apply to motions for stay pending appeal, because the statute has no conceivable alternate applications.

WLF is a public interest law and policy center with supporters in all 50 States. It devotes a significant portion of its resources to supporting the prompt deportation of aliens who enter or remain in the United States in violation of our law, thereby ensuring that those aliens do not take immigration opportunities that might otherwise be extended to others. WLF filed its brief in this case on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard A. Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.