New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 266—NO. 31
FRIDAY, AUGUST 13, 2021

EASTERN DISTRICT ROUNDUP

Expert Analysis

No Basis for Bail, Travel Requirement Not Preempted, TRO Denied

This column reports on several significant representative decisions handed down recently in the U.S. District Court for the Eastern District of New York. Judge Joanna Seybert saw no basis to grant bail pending sentence, despite defendant's plea to a lesser charge of the indictment. Judge Brian M. Cogan held that requiring certain out-of-state travelers to fill out a New York state COVID-19 health form on entering the state does not violate the Supremacy Clause. Judge Cogan also declined to grant a TRO directing the U.S. Embassy in Djibouti to adjudicate Form I-130 petitions under a fast-approaching deadline set by plaintiffs.

By **Harvey M. Stone**

And **Richard H. Dolan**

Bail Pending Sentence

In *United States v. Cincinelli*, 19 CR 0245 (EDNY, June 18, 2021), Judge Seybert denied bail pending sentence, 18 U.S.C. §3143(a)(1), where defendant failed to meet her burden of showing that she was not a danger to the community.

In May 2019 defendant was indicted on two counts of murder for hire and one count of obstruction of justice. The charges relate to an alleged plot by defendant and her former boyfriend to have a hitman murder her ex-husband and her then-boyfriend's teenage daughter, and defendant's effort to obstruct an investigation into this scheme.

> Defendant's plea to obstruction of justice supports detention pending sentence. As previously found, her release could lead to further obstruction.

Defendant sought pre-trial release, without success, at her arraignment before Magistrate Judge Anne Y. Shields. She subsequently petitioned Judge Sandra F. Feuerstein for release on bail. Feuerstein considered recorded conversations between defendant and her then-boyfriend, an evaluation of defendant by a clinical psychologist, and the transcript of a family court hearing involving an alleged intended victim of the murder-for-hire plan. In denying bail Feuerstein found that defendant remained a danger to the community, especially in light of evidence that (1) she resented both the minor victim's relationship with her father (defendant's paramour) and the potential claim that her ex-husband might assert to share in her pension; (2) defendant "lack[s] impulse control and remorse" and acted defensively; and (3) given her behavior in family court, she could destroy evidence and ignore other court directives. Later, making some new arguments, defendant asked Feuerstein again for bail. Feuerstein rejected that application, and the Second Circuit summarily denied defendant's appeal.

In April 2021, to resolve the charges against her, defendant pleaded guilty before Seybert to one count of obstructing a federal grand jury investigation. At the plea hearing defendant requested bail for a fifth time. Pursuant to §3143, after a guilty plea there is a presumption that a defendant should

HARVEY M. STONE *and* RICHARD H. DOLAN *are partners at Schlam Stone & Dolan.* BENNETTE D. KRAMER, *a partner of the firm, assisted in the preparation of the article.*

be detained. Defendant argues that the government's dismissal of the murder-for-hire charges as part of the plea deal has shifted the balance in her favor on this latest application. But in view of the prior orders denying bail and the evidence underlying those decisions, nothing has substantially changed the calculus. The record justifies the consistent findings "that Defendant presents a danger to her community and the victims and that her release presents the risk of further obstruction of justice[.]" Additionally, Seybert "has received communications from the alleged adult victims expressing that they both 'vehemently oppose' Defendant's release." Slip op. 6.

Indeed, defendant's plea to obstruction of justice supports detention pending sentence. As previously found, her release could lead to further obstruction. Contrary to defendant's argument, the government may properly rely here on the facts underlying the murder-for-hire charges. These facts may also be considered at sentencing. While defendant's "exposure to a sentence of more than five years has been significantly reduced," the record requires a denial of bail. Slip op. 8-9.

State COVID-19 Travel Form Requirement Not Preempted By Federal Law

In *Weisshaus v. Cuomo*, 20 CV 5826 (EDNY, June 20, 2021), Judge Cogan dismissed claims alleging that a New York state COVID-19 traveler health form requirement was preempted by federal law.

By executive order of Gov. Andrew Cuomo, the "New York State Traveler Health Form" and related state policies require persons entering New York state from a non-contiguous state after an absence of more than 24 hours to disclose whether they have taken a COVID-19 test or experienced any COVID-19 symptoms in the last 72 hours, or visited a country with a CDC Level 2 or Level 3 health notice in the last two weeks (and, if so, to provide details of that travel and identify their destination in New York state). Failure to comply is punishable by a civil penalty up to $10,000 or imprisonment up to 15 days.

After being required to fill out the form when entering New York state, plaintiff Yoel Weisshaus sought to enjoin this requirement, arguing that it was preempted by 6 U.S.C.§211, which established and governs the operation of the U.S. Customs and Border Protection Department (Customs). Plaintiff had standing to make this challenge because he had plausibly alleged an intention to leave and return to New York state in August and October. But the preemption doctrine did not apply. Slip op. 4-12.

Plaintiff relied on the principle of "field preemption", which requires a showing that Congress has "legislated so comprehensively in a particular field that it left no room for supplementary state legislation" (quoting *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020)), or that "there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)). Slip op. 7.

A key to analysis of field preemption is identifying the relevant field. Cogan rejected plaintiff's argument that the field was admission into the United States, because plaintiff had not plausibly alleged that failure to complete the form would result in a denial of entry. The relevant field was, rather, public health inspection at a state border. Plaintiff had not pleaded facts sufficient to establish a Congressional intent to preempt state regulation within that field.

"In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 567 U.S. at 400. Slip op. 8. 6 U.S.C. §211 does not contain a preemption clause, and the long list of duties it assigns to Customs includes screening for violations of trade, immigration laws, and agricultural laws, but not for disease. 42 U.S.C. §264, which authorizes the U.S. Surgeon General to promulgate regulations concerning the spread of communicable diseases by foreign or domestic interstate travelers, expressly disclaims an intent to preempt state law. 42 U.S.C. §264(c).

In rejecting plaintiff's contention that the states have no power at a port of entry, Cogan also relied on *Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health of the State of Louisiana*, 118 U.S. 455, 465 (1886) (quarantine laws "belong to that class of state legislation … which are valid until displaced or contravened by some legislation of congress"), and *Hickox v. Christie*, 205 F. Supp. 3d 579, 590 (D.N.J. 2016) (federal law continues to "mandate[] federal noninterference and cooperation

with the states' execution of their quarantine laws."). Slip op. 10-11.

Form I-130 Petition

In *Al Saidi v. U.S. Embassy in Djibouti*, 21 CV 3393 (EDNY, June 18, 2021), Judge Cogan denied a motion for a TRO directing defendants to adjudicate by June 23, 2021, plaintiffs' Form I-130 Petitions for Alien Relatives to immigrate to the United States.

Plaintiffs were Al Saidi, a U.S. citizen, and his two minor children, who were born in Yemen and lived there throughout their lives, never living in the United States. One child was to turn 18 on June 29, 2021, and the other the following year. Ten years earlier, Al Saidi's requests for passports for the children as automatic citizens because they were children of a U.S. citizen had been denied by the U.S. Embassy in Sana'a, Yemen, because Al Saidi could not present sufficient evidence to confirm five years of physical presence in the United States prior to the children's birth. Plaintiffs had an appointment at the U.S. Embassy in Djibouti on May 2, during which they submitted I-130 packages for the two children to enable them to immigrate to the United States. At the interview, consular officers asked Al Saidi a series of questions about his relationship with his children. One of the officers then told Al Saidi that the applications would be sent to the U.S. Citizenship and Immigration Services (USCIS) in the United States.

Cogan determined that plaintiffs were not entitled to a TRO because they had not demonstrated irreparable harm or a likelihood of success, and the public interest did not weigh in favor of the requested relief. Derivative citizenship is automatic for children born outside the United States under 8 U.S.C. §1431(a) when (1) at least one parent of the child is a citizen of the United States; (2) the child is under 18; and (3) the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence. Here, the children had never been in the legal and physical custody of Al Saidi pursuant to a lawful admission for permanent residence. In addition, if the Form I-130 petitions were granted and other conditions were met, the children would be eligible until they were 21 to receive immigrant visas, immigrate to the United States and eventually become naturalized citizens.

To avoid error and fraud, decisions on Form I-130 petitions need to be made with care to establish the existence of a qualifying relationship between the U.S. citizen and the alien beneficiary.

Plaintiffs also did not show a likelihood of success. There was no basis for plaintiffs' assertion that defendants had to process and decide their applications by June 23rd. The time for processing these petitions is usually measured in years, and courts have found that delays of as long as five years are not unreasonable. Moreover, granting relief would place plaintiffs ahead of the people already in the queue. The officers at the embassy determined that the applications were not "clearly approvable" and gave notice to Al Saidi that they would have to send the applications to USCIS in America for issuance of a request for further information. The APA expressly exempts discretionary agency actions, such as USCIS processing of I-130 petitions, from judicial review. 5 U.S.C. §701(a)(2). The doctrine of consular non-reviewability also provides that courts have no jurisdiction to review decisions made by consular officers regarding the grant or denial of visas, even if the decision was erroneous, arbitrary or contrary to agency regulations. Slip op. 10-11.

Finally, the public interest did not support the requested relief. To avoid error and fraud, decisions on Form I-130 petitions need to be made with care to establish the existence of a qualifying relationship between the U.S. citizen and the alien beneficiary. Nor is it in the public interest to allow plaintiffs to cut to the front of the line. Plaintiffs here waited until the last minute to file their petitions, creating their own emergency. Slip op. 12.