RECENT DEVELOPMENT

Auguste v. Ridge: Functional Inapplicability of the United Nations Convention Against Torture in the United States

I. OVERVIEW

Napoleon Bonaparte Auguste, a Haitian lawfully residing in the United States, was convicted of attempting to sell cocaine in April 2003.[1] The Department of Homeland Security, Bureau of Immigration and Customs Enforcement, began proceedings to return him to Haiti in July of that year.[2] Auguste's sole challenge to his deportation was brought under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT or Convention).[3] Auguste contended that the United States was barred from deporting him under article 3 of the Convention, because he was likely to be tortured by authorities upon his return to Haiti.[4] Although Auguste made no claim of past torture at the hands of Haitian officials, he submitted evidence of the deplorable conditions in the Haitian prisons where he would be indefinitely detained.[5] The immigration judge (IJ) held that Auguste was not entitled to protection under the CAT because he failed to show that Haitian authorities "specifically intended" to torture returning criminal deportees.[6] The IJ further concluded that Auguste had failed to meet his burden of proving that he was "more likely than not" to be tortured if returned.[7] The Board of Immigration Appeals (B.I.A.) affirmed the IJ's decision without an opinion.[8]

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1. Auguste v. Ridge, 395 F.3d 123, 128 (3d Cir. 2005).
2. *Id.*
3. *Id.* at 129.
4. *Id.*
5. *See id.* at 134.
6. *Id.* at 134-36.
7. *Id.*
8. *Id.* at 136.

Auguste subsequently filed a habeas corpus petition in the United States District Court for the District of New Jersey, challenging the denial of his CAT claim.[9] The district court held, like the IJ and B.I.A. before it, that article 3 of the CAT did not bar the United States from deporting Auguste to Haiti.[10] In affirming the district court on appeal, the United States Court of Appeals for the Third Circuit *held* that the "specific intent" requirement and the "more likely than not" burden of proof were consistent with the Convention's implementing legislation, and that under these standards Auguste was not eligible for deferral of his deportation to Haiti. *Auguste v. Ridge*, 395 F.3d 123, 145, 149, 154 (3d Cir. 2005).

II. BACKGROUND

The Convention was created to assist nations in achieving more effective implementation of the existing international prohibition on the practice of torture and other inhuman or degrading treatment or punishment.[11] Article 3 of the Convention prohibits States from deporting persons if "there are substantial grounds for believing that [they may] be in danger of being . . . torture[d]" in the removal State.[12] In ratifying the CAT, the United States Senate expressed a number of reservations, understandings, and declarations.[13] Among these was a declaration that the CAT was not self-executing and would therefore require implementing legislation from Congress.[14] This legislation came in the form of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).[15]

FARRA restricts judicial review of claims raised under the CAT to reviews of final removal orders under section 242 of the Immigration and Nationality Act (INA).[16] This effectively strips federal courts of jurisdiction to directly review final removal orders issued for certain classes of criminal aliens, who are deported under a different section of the INA.[17] Courts have nevertheless permitted aliens whose direct

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9. *Id.* at 136-37.
10. *Id.* at 137.
11. G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).
12. *Id.* art. 3.
13. Ogbudimkpa v. Ashcroft, 342 F.3d 207, 211-12 (3d Cir. 2003).
14. *Id.* at 212.
15. *Id.* at 209, 212; Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822.
16. Foreign Affairs Reform and Restructuring Act § 2242(d).
17. Wang v. Ashcroft, 320 F.3d 130, 141 (2d Cir. 2003).

appeals of final removal orders are barred under FARRA to challenge the agency determinations through a writ of habeas corpus.[18]

In *Ogbudimkpa v. Ashcroft*, the Third Circuit compared the jurisdictional provisions in FARRA with those that the Supreme Court encountered in *St. Cyr*.[19] By analogy to the Supreme Court's decision in that case, the Third Circuit held that despite the clear withholding of jurisdiction for review of certain cases under FARRA, federal courts may hear habeas claims arising from its provisions.[20] The court reasoned that habeas corpus had historically been the mechanism by which the legality of executive detention was reviewed and noted that absent a clear indication by Congress of its intent to suspend the writ, such an extreme exercise of constitutional power could not be inferred.[21]

In *Wang v. Ashcroft*, the United States Court of Appeals for the Second Circuit identified the boundaries of habeas review with respect to CAT rulings.[22] The court noted that habeas review "encompassed . . . errors of law, [as well as] erroneous application or interpretation of statutes."[23] Accordingly, a determination by the B.I.A. that there was "no evidence of torture" in a given country could be challenged in a habeas action, as it necessarily applied the statutory definition of torture to the facts on record.[24]

FARRA authorized federal agencies to create regulations to enforce the CAT.[25] These regulations require, among other things, that the applicant show that he or she is "more likely than not" to be "tortured" if sent to the proposed country of removal.[26]

In *In re J-E-*, the B.I.A. applied the definition of torture and standard of proof provided in FARRA's implementing regulations.[27] The Board held that the respondent, who had been convicted of selling cocaine in the United States, had not met his burden of proving that he was "more likely than not" to be tortured upon being imprisoned in Haiti.[28] The B.I.A. noted that to constitute torture, an act must be "specifically intended to inflict severe physical or mental pain or

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18. *Id.* at 142; *Ogbudimkpa*, 342 F.3d at 221.
19. *Ogbudimkpa*, 342 F.3d at 217.
20. *Id.*
21. *Id.* at 215-17.
22. *Wang*, 320 F.3d at 143.
23. *Id.* (emphasis omitted) (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 302 (2001)).
24. *See id.*
25. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822.
26. *See* 8 C.F.R. § 208.17 (2004).
27. *In re* J-E-, 23 I. & N. Dec. 291, 292 (B.I.A. 2002).
28. *Id.* at 292, 304.

suffering."[29] Specific intent differs from general intent in that the perpetrators must not only know that their actions are likely to have a given effect, but they also must intend the effect.[30] The Board noted that the conditions in Haitian prisons were caused by budgetary problems and that the Haitian government was making an attempt at reform.[31] Thus, although criminal deportees were intentionally detained for indefinite periods of time in substandard detention facilities and risked being beaten with fists, sticks, and belts, Haitian authorities lacked the specific intent to inflict severe physical or mental pain or suffering upon the deportees.[32] The pain and suffering of the deportees was, by this reasoning, an unintended consequence of a legitimate state action.[33] Accordingly, the B.I.A. found that the conduct of the guards and the conditions in Haitian prisons did not amount to torture as defined by the regulations implementing FARRA.[34]

The alien in *In re J-E-* was also able to produce evidence that, in some instances, Haitian prisoners were treated in a way that did amount to torture under the regulations.[35] The B.I.A. determined, however, that these instances of torture were neither pervasive nor widespread and that the alien had not shown, by objective evidence, that he was "more likely than not" to be subject to such treatment.[36] The B.I.A. dismissed the appeal and affirmed the deportation order.[37]

In *Zubeda v. Ashcroft*, the Third Circuit considered the direct appeal of a CAT determination regarding an individual to be deported to the Democratic Republic of the Congo.[38] Although the IJ ruled that the individual qualified for protection under article 3 of the Convention, the B.I.A. vacated this decision, noting that the IJ's conclusion that the individual would be detained after deportation was not supported by sufficient evidence.[39] The Third Circuit's decision to remand the case to the IJ included a detailed discussion of the applicable standards for granting article 3 protection under title 8, section 208.18(a) of the Code of Federal Regulations.[40] Notably, the court concluded that although the

29. *Id.* at 298.
30. *See* Carter v. United States, 530 U.S. 255, 268 (2000).
31. *In re J-E-*, 23 I. & N. Dec. at 301.
32. *Id.*
33. *See id.* at 300.
34. *Id.* at 301.
35. *Id.* at 302.
36. *Id.* at 304.
37. *Id.*
38. Zubeda v. Ashcroft, 333 F.3d 463, 465 (3d Cir. 2003).
39. *Id.* at 474-75.
40. *Id.* at 473.

regulations state that "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering," this should not be interpreted as including a "specific intent" requirement.[41] This interpretation of the intent requirement is notably different from that applied by the B.I.A. in *In re J-E-*.[42] There, the B.I.A. inquired into whether Haitian authorities, by detaining prisoners in jails where they would be beaten, malnourished, or otherwise abused, intended to cause severe pain or mental suffering.[43] The Third Circuit in *Zubeda*, however, inquired into the intent of the offender to commit an act from which severe pain or mental suffering was only a foreseeable consequence.[44]

The European Court of Human Rights grappled with the issue of intent in the case of *D. v. United Kingdom*.[45] There, an alien who had been convicted of attempting to smuggle cocaine into the United Kingdom requested relief under the European Union Convention for the Protection of Human Rights and Fundamental Freedoms (E.U. Convention).[46] The alien in question had contracted HIV and was in need of medical treatment.[47] It was undisputed that he could not receive adequate treatment for his illness if he was deported because the receiving country did not have the required medical facilities.[48] Although the court recognized that protection under the E.U. Convention had traditionally required the proscribed treatment be intentionally inflicted by the authorities of the receiving country, it chose to treat this intent requirement lightly.[49] The court decided that limiting the application of the E.U. Convention to those cases in which the harmful conduct was intentional would undermine its underlying purpose.[50] Instead, it determined that protection should be extended even in those situations in which the government of the receiving state is powerless to prevent a deportee from being subjected to inhumane treatment, but there is a real risk that the individual will experience such treatment.[51]

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41. *Id.*
42. *See id.* (quoting 8 C.F.R. § 208.17 (2004)). *But see In re J-E-*, 23 I. & N. Dec. at 301.
43. *In re J-E-*, 23 I. & N. Dec. at 301.
44. *Zubeda*, 333 F.3d at 474.
45. D. v. United Kingdom, No. 146/1996/767/964, 3 Eur. Ct. H.R. (1997).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

III. THE COURT'S DECISION

In the noted case, the Third Circuit considered what was essentially a challenge to the B.I.A. ruling in *In re J-E-*.[52] Auguste's only avenue of appeal from the decision of the B.I.A. was through a writ of habeas corpus because, as a criminal alien, he was outside the court's immediate jurisdiction.[53] The court concluded that it had jurisdiction to consider a CAT appeal in the form of a habeas petition, though noted that its inquiry would be limited to errors of law.[54] Auguste was therefore barred from challenging the IJ's determination that the facts of his case were identical to those in *In re J-E-*.[55]

Auguste advanced three arguments on appeal, which the court addressed in turn.[56] First, Auguste contended that the B.I.A. erred in *In re J-E-* by requiring acts to be specifically intended to cause severe physical or mental pain or suffering to be considered torture.[57] He argued that such a requirement is inconsistent with the international understanding of the CAT.[58] Auguste also pointed out that the Board's decision was inconsistent with the Third Circuit's 2003 decision in *Zubeda* and argued that the B.I.A.'s interpretation of the standard by reference to its meaning in American law was inappropriate.[59] Auguste's second argument challenged the "more likely than not" burden of proof as inconsistent with article 3, which requires an alien to show only "substantial grounds for believing [one] would be in danger of being subjected to torture."[60] Third, Auguste contended that even under the "specific intent" standard, and the "more likely than not" burden of proof, he was entitled to relief because Haitian authorities knowingly detain criminal deportees in prisons in which they will be subject to treatment specifically intended to cause severe pain and suffering.[61] As a result, it was "more likely than not" that Auguste, a criminal deportee, would be subjected to torture if returned to Haiti.[62] Following a discussion of the law, the court rejected each of these arguments.[63]

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52. *See* Auguste v. Ridge, 395 F.3d 123, 138 (3d Cir. 2005).
53. *Id.* at 137.
54. *Id.* at 137-38.
55. *Id.* at 138.
56. *Id.* at 138-39.
57. *Id.* at 138.
58. *Id.*
59. *Id.* at 138, 144.
60. *Id.* at 138-39.
61. *Id.* at 139.
62. *Id.*
63. *See id.* at 139-54.

Addressing Auguste's first argument, the court in the noted case first considered the validity of FARRA and its implementing regulations.[64] The court reasoned that FARRA reflected the understandings, reservations, and declarations expressed by the United States during the ratification of the Convention.[65] Because FARRA was consistent with the intent of both the President and Senate in ratifying the Convention, the court held that it was necessarily binding as domestic law.[66] In so holding, the court purposefully left unresolved the question as to whether the reservations expressed by the President and Senate, and codified in FARRA, were valid under international law.[67] Instead, it focused upon the constitutional roles of the Executive and Senate in the treaty-creation process.[68] Where, as here, the President and Senate have a common understanding of the meaning of a treaty and ratify it in accordance with their roles under the Constitution, the court felt that domestic law created to enforce the treaty could not be challenged on international grounds.[69]

The implementing regulations of FARRA require that to be considered torture, an act must "be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture."[70] In *In re J-E-*, the B.I.A. interpreted the term "specific intent" as it is ordinarily defined in American courts.[71] In considering Auguste's challenge to this interpretation, the Third Circuit deferred substantially to the interpretation of the B.I.A., in accordance with principles of deference to the interpretation and application of immigration law by executive agencies.[72] The court concluded that the B.I.A. had not erred by defining "specific intent" with reference to its domestic meaning.[73] For individuals to act with specific intent in the domestic context, they must "intend to achieve the forbidden act."[74] Accordingly, the court held that it was insufficient that the Haitians knew that the likely effect of

64. *Id.* at 140.
65. *Id.*
66. *Id.* at 142.
67. *See id.* at 140, 142-43.
68. *Id.* at 141-43.
69. *See id.* at 143.
70. 8 C.F.R. § 208.18(a)(5) (2004).
71. *See In re* J-E-, 23 I. & N. Dec. 291, 301 (B.I.A. 2002); *Auguste*, 395 F.3d at 144.
72. *Auguste*, 395 F.3d at 144.
73. *Id.* at 145.
74. *Id.*

imprisoning the deportees was the infliction of severe pain and suffering.[75]

Ordinarily, the Third Circuit panel in the noted case would be bound by the decision of another panel within the same circuit.[76] The panel in the noted case, however, refused to follow the *Zubeda* panel's decision with respect to the "specific intent" requirement under FARRA.[77] The court reasoned that the section of the *Zubeda* decision renouncing the need for proof of specific intent under FARRA was dicta.[78] In doing so, the court noted that the holding in *Zubeda* was limited to the defects in the B.I.A.'s cursory review of the IJ's decision in that case, and it did not include the discussion of the applicable intent standard.[79] Having freed itself from the language in *Zubeda*, the court in the noted case mandated a specific intent requirement.[80]

The court came next to Auguste's challenge to the "more likely than not" burden of proof, which required him to show that there was a greater than fifty percent chance that he would be tortured if deported to Haiti.[81] Auguste relied principally on the language of the Convention, which required a showing only of "substantial grounds for believing that he would be in danger of being subjected to torture."[82] In dismissing this apparent difference in the wording of the Convention on the one hand, and FARRA on the other, the court advanced two arguments.[83] First, it claimed to be bound by prior Third Circuit panel decisions applying the "more likely than not" standard.[84] As already noted, under the rules of the Third Circuit, decisions of prior panels have the effect of binding precedent.[85] Second, the court found support for the "more likely than not" standard in the understandings issued during the ratification process of the Convention.[86] Because FARRA was seen merely to codify this understanding of the proper burden of proof under the Convention, it was held to be unassailable.[87]

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75. *Id.* at 146.
76. *Id.* at 149.
77. *Id.* at 148.
78. *Id.*
79. *Id.*
80. *See id.*
81. *Id.*; *cf.* Khup v. Ashcroft, 376 F.3d 898, 907 (9th Cir. 2004).
82. *Auguste*, 395 F.3d at 148.
83. *Id.* at 149.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

In addressing Auguste's last line of argument, that even under the "more likely than not" burden of proof and specific intent standard he is entitled to relief under the Convention, the court essentially replicated the holding of the B.I.A. in *In re J-E-*.[88] At the outset, the court acknowledged that it is not permitted to challenge the factual findings of the IJ or the B.I.A. in the present case.[89] As noted above, a habeas petition may only challenge interpretation of the law and application of the law to the facts.[90] Interestingly, the only apparent finding of fact in the present case was that it was indistinguishable from *In re J-E-*.[91] The practical effect was that Auguste had to challenge his deportation on the facts of that case.[92]

The court in the noted case began by discussing part of the B.I.A.'s holding in *In re J-E-*, which found that the imprisonment of criminal deportees in Haiti for indefinite periods of time is a lawful sanction designed to protect the citizens of Haiti.[93] The court in the noted case, however, did not address Auguste's challenge to this holding.[94] Instead, it noted that irrespective of the validity of that holding, the critical finding of the B.I.A. in *In re J-E-* was that the sanctions were not "specifically intended" to inflict pain and suffering upon the deportees.[95]

The court then moved on to discuss whether the Haitian government specifically intended to inflict severe pain and suffering upon criminal deportees by holding them in prisons where they would be subject to "deplorable" conditions.[96] In holding that the Haitian government lacked the specific intent to torture, the court appeared to rely on the B.I.A.'s finding in *In re J-E-* that the prison conditions were the result of financial and managerial issues outside of the immediate control of the government.[97] Because the prison conditions exist as a result of factors that the government does not control and because there have been efforts to make the situation better, the court deduced that the Haitian government does not specifically intend to inflict severe pain and suffering upon their prison population generally, and criminal deportees in particular.[98] Thus, even though they know that severe pain and

88. *See id.* at 150-54.
89. *Id.* at 150.
90. *Id.*
91. *Id.*
92. *See id.* at 150-54.
93. *Id.* at 152.
94. *Id.*
95. *Id.*
96. *Id.* at 153.
97. *See id.*
98. *See id.* at 153-54.

suffering may be inflicted as a result of the imprisonment of the deportees, the Haitian government is not engaged in torture as defined by FARRA.

Finally, the court addressed the reports of prisoner abuse that included beatings with fists, sticks, and belts, as well as burning with cigarettes, choking, hooding, and severe boxing of the ears.[99] The court was unconvinced that these incidents, which may amount to torture, were widespread and pervasive enough to warrant a finding that the deportee would be "more likely than not" to be subjected to them.[100] Accordingly, Auguste's opposition to his deportation failed.[101]

IV. CRITICISM AND ANALYSIS

The Third Circuit in the noted case made it clear in its holding that although the United States ratified the Convention, individuals held by the U.S. government have no rights arising from its provisions.[102] An individual's rights are only those included in the federal regulations implementing the Convention.[103] This view is generally consistent with the Third Circuit's treatment of FARRA and the CAT in *Ogbudimkpa* and the Second Circuit's discussion of FARRA's legislative history in *Wang*.[104] Even where the courts have referred to an individual's claim under the CAT, they have applied the standards set forth in the FARRA regulations.[105] The Third Circuit's holding in this respect is therefore rather uncontroversial.

The court's jurisdiction over habeas petitions arising out of final removal orders is also well supported by the case law.[106] The Third Circuit had already explored the availability of habeas review of B.I.A. orders in *Ogbudimkpa* and determined that given the Supreme Court's decision in *St. Cyr*, such review was appropriate.[107] The Second Circuit reached a nearly identical conclusion in *Wang*.[108] Accordingly, Auguste's habeas claims appear to have been squarely within the court's

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99. *Id.* at 154.
100. *Id.*
101. *Id.*
102. *Id.* at 132 n.7.
103. *Id.*
104. Ogbudimkpa v. Ashcroft, 342 F.3d 207, 221 n.24 (3d Cir. 2003) (presuming CAT is not self-executing); Wang v. Ashcroft, 320 F.3d 130, 140 (2d Cir. 2002) (stating that based on the legislative history, the CAT is not a self-executing treaty).
105. *See* Khup v. Ashcroft, 376 F.3d 898, 906 (9th Cir. 2004); *see also* Udenze v. Riley, No. 03-2337, 2003 U.S. Dist. LEXIS 14738, at *8 (E.D. Pa. Aug. 22, 2003).
106. *See Ogbudimkpa*, 342 F.3d at 221; *Udenze*, 2003 U.S. Dist. LEXIS 14738, at *11-14.
107. *See Ogbudimkpa*, 342 F.3d at 215.
108. *See Wang*, 320 F.3d at 141.

jurisdiction. The court also correctly recognized that the scope of its habeas jurisdiction was not so broad as to encompass review of the factual determinations of the executive agencies.[109] This position is based in large part upon the *Wang* court's discussion of the history of the habeas writ.[110] Because the court properly limited its inquiry to errors of law and application of law to the facts, it correctly held that Auguste was bound by the factual findings of the IJ.[111] By extension, the court in the noted case was compelled to review the facts in *In re J-E-*.[112]

In the noted case, the court was quick to rid itself of the analysis of the "specific intent" standard contained in *Zubeda*.[113] The court was wise to recognize that the discussion of specific intent in *Zubeda* was dicta and therefore not binding circuit precedent. The principal holding in *Zubeda* was that the B.I.A. had inappropriately disregarded the factual findings of the IJ.[114] Specifically, the B.I.A. failed to recognize that the IJ had taken administrative notice of the fact that a deportee was likely to be detained in the receiving country.[115] The *Zubeda* court's discussion of the intent element of torture under 8 C.F.R. § 208.18 was therefore superfluous. It is interesting, however, that the court in the noted case elected not to follow the reasoning in *Zubeda*.

The *Zubeda* court offered two explanations in support of its conclusion that despite the "specific intent" language in the statute, it is not the appropriate standard under FARRA.[116] In one explanation, the court relied upon 8 C.F.R. § 208.18(a)(4), which defines mental torture.[117] It seized upon the statute's inclusion of various threatening acts that may amount to torture if mental harm results.[118] The *Zubeda* court erred in its belief that because no intent to complete the threatened act was required in the statute, specific intent could not be the appropriate standard of intent. The court confused the intent to commit the threatened act with intent to cause the resulting mental harm.[119] While persecutors need not actually intend to kill an individual for their death threats to constitute torture, they must still intend to inflict the mental harm that results from the threats. In this way the specific intent standard is consistent with 8

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109. *See* Auguste v. Ridge, 395 F.3d 123, 137-38 (3d Cir. 2005).
110. *See Wang*, 320 F.3d at 143.
111. *See Auguste*, 395 F.3d at 138, 150
112. *See id.* at 150.
113. *Id.* at 148.
114. Zubeda v. Ashcroft, 333 F.3d 463, 475 (3d Cir. 2003).
115. *Id.*
116. *See id.* at 473-74.
117. *See id.* at 473; 8 C.F.R. § 208.18(a)(4) (2004).
118. *See Zubeda*, 333 F.3d at 473-74.
119. *See id.* at 474.

C.F.R. § 208.18(a)(4), and the court in the noted case was well advised not to follow *Zubeda* in this respect.

The other proffered explanation in *Zubeda* was similarly weak. The *Zubeda* court took a more holistic view of 8 C.F.R. § 208.18, giving greater weight to the wording in the statute that seeks to exclude acts that result only in unanticipated or unintended severity of pain from the torture definition.[120] The words "specific intent" are, under this reading, used only to illustrate that the acts must be deliberate.[121] Board Member Rosenberg took a similar view in her dissent in *In re J-E-*.[122] In part, she relied upon the difficulty of proving specific intent in the context of a CAT claim to justify discarding the requirement.[123] Such a reading of 8 C.F.R. § 208.18 is, however, questionable given FARRA's posture. As Board Member Rosenberg admits in her dissenting opinion, "[i]t is no secret that Congress was not pleased with being obligated to extend [CAT] protection to persons, including those with criminal convictions, who are barred from eligibility for asylum and withholding of removal."[124] FARRA itself states that Congress's intent was to exclude criminal aliens from protection under the CAT "[t]o the maximum extent" possible.[125] It is not so unreasonable, therefore, to read the regulations as requiring a high threshold of intent with respect to torture. The court in the noted case was well within its discretion in holding that an act must be specifically intended to cause severe pain and suffering to constitute torture. In so doing, it gave effect to the plain language of the statute.

The court in the noted case was certainly not compelled to follow the example of the European Court of Human Rights in *D. v. United Kingdom*, where the court chose not to require any proof of intent to torture, notwithstanding the fact that such proof had been traditionally required.[126] In justifying this decision, the European Court of Human Rights looked to the object and purpose of the European CAT, rather than to past practice.[127] The court in the noted case could not do so due to the rather explicit statutory language requiring proof of specific intent.[128]

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120. *Id.* at 473-74.

121. *Id.*

122. *See In re* J-E-, 23 I. & N. Dec. 291, 315 (B.I.A. 2002) (Rosenberg, Board Member, dissenting).

123. *Id.* at 317.

124. *Id.* at 311.

125. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822.

126. D. v. United Kingdom, No. 146/1996/767/964, 3 Eur. Ct. H.R. (1997).

127. *Id.*

128. 8 C.F.R. § 208.18(a)(5) (2004).

The "more likely than not" standard, as applied by the court in the noted case, is not without precedent.[129] That said, the court did take a notably restrictive approach to the standard which, although technically requiring proof of a greater than fifty percent probability of torture, is inherently an exercise in discretion.[130] The court's interpretation of the standard is generally in line with that of the Second Circuit in *Wang*. The *Wang* court denied deferral of removal of a Chinese military deserter after he had shown, among other things, that China had a history of human rights abuses and that he had previously been beaten to the point of unconsciousness for attempting to desert.[131] Further, the individual testified that his lieutenant had promised to kill him if he ever deserted again.[132] Despite these facts, the court held that the individual had failed to establish that he was "more likely than not" to be tortured as a returning military deserter.[133] The court in the noted case applies a similarly harsh approach, requiring applicants to show the near certainty of their torture in the receiving country to merit relief under FARRA. On the facts of *In re J-E-*, a different court may well have granted Auguste relief.

The Ninth Circuit has taken what appears to be a lighter approach than the Second and Third Circuits in applying the "more likely than not" burden of proof.[134] In *Khup*, the Ninth Circuit gave great weight to evidence introduced by the alien showing that the government of the receiving state was physically abusing, and sometimes even killing or mutilating, people like him.[135] This approach, unlike that of the Second Circuit and the court in the noted case, appears to have been calculated to prevent likely torture from occurring and not designed to grant deferral in only the most extreme cases.

V. CONCLUSION

The court in the noted case, through its callous application of the "more likely than not" standard, has endorsed the most restrictive approach to granting relief under FARRA. Unfortunately, its decision

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129. *See* Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003).

130. *Compare Wang*, 329 F.3d at 144 (holding that despite evidence of past torture, and specific torture threats, the burden of proof was not met), *with* Khup v. Ashcroft, 376 F.3d 898, 907 (9th Cir. 2004) (holding that the burden of proof was met after evidence was submitted showing members of the alien's religion had been tortured).

131. *Wang*, 320 F.3d at 136.

132. *Id.*

133. *Id.* at 144.

134. *See Khup*, 376 F.3d at 907.

135. *Id.*

appears to fall in line with Congress's intent in passing FARRA, and the Senate and Executive's half-hearted ratification of the Convention. While the court certainly could have softened the blow of FARRA's stringent requirements for pending deportees, their decision in the noted case was supported by both the plain reading of the statutory language and the decisions of other circuits. The greatest concern is that the courts are elevating the "more likely than not" burden of proof beyond reasonable limits. Under the current state of the law, aliens must show to a near certainty that they will be tortured. Ultimately, however, it is the political leadership that should be held responsible for failing to give meaningful effect to the Convention through domestic legislation. Their desire to achieve the bare minimum level of compliance with the international obligations of the United States is an embarrassment, especially given the universal acknowledgement that torture is an evil that nations should strive to eliminate.

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