UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANTONIO GORSIRA, Petitioner,	:	
v.	:	CIVIL ACTION NO. 3:03cv1184 (SRU)
JAMES LOY, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY, and ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, Respondents.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Antonio Gorsira, currently detained by the Bureau of Immigration and Customs Enforcement ("BICE") pending removal, petitions this court for a writ of habeas corpus.[1] Gorsira principally claims that he has derived United States citizenship and thus is not removable.[2] I conclude that Gorsira has derived citizenship and grant his petition for a writ of habeas corpus.

[1] The original petition named John Ashcroft, Attorney General of the United States, as the respondent. Following various organizational changes, BICE, a branch of the Department of Homeland Security ("DHS"), is presently charged with the enforcement functions of the former Immigration and Naturalization Service. *See generally* Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002); 6 U.S.C. §§ 251(2), 252(a)(3), and 542. Because of the reorganization, there are now two cabinet level officials who may be ultimately responsible for Gorsira during his detention. *Compare* 8 U.S.C. § 1103(a)(1) (the Secretary of DHS is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens) *with* 8 U.S.C. § 1226 (Attorney General detains and maintains custody of aliens). Although neither party had moved for substitution, the court ordered *sua sponte* the substitution of James Loy, Acting Secretary of the Department of Homeland Security, as respondent prior to the issuance of this decision. Following that substitution, the court added current Attorney General, Alberto Gonzales, as a respondent.

[2] Gorsira also claims that his past criminal convictions for narcotics possession and threatening in the second degree are not bases for removal under the Immigration and Nationality Act, 8 U.S.C. § 1227. There is no need to address those contentions.

I. Background

Gorsira is a native of Guyana and was born on January 8, 1974. Although a father is named on his birth certificate[3] and Gorsira has stipulated that the man listed is his biological father, Gorsira was born out of wedlock and was thus at birth deemed illegitimate under Guyanese law. Gorsira's biological father never had physical or legal custody of Gorsira nor did he ever provide maintenance or support.

Gorsira entered the United States on an immigrant visa on January 9, 1982, at the age of eight. His mother was naturalized on December 13, 1991, when Gorsira was seventeen years old, in his mother's sole custody, and living in the United States as a lawful permanent resident.

On June 25, 1996, Gorsira pled guilty to a charge of narcotics possession. On February 13, 2002, he pled guilty to a charge of threatening in the second degree. Following those convictions, the former Immigration and Naturalization Service instituted removal proceedings against him.

II. Removal Proceedings

At his initial hearing before an immigration judge ("IJ") on June 24, 2002, Gorsira was accompanied by an accredited representative. The IJ ruled that Gorsira had not derived citizenship through his mother and thus that he was removable. Gorsira did not appeal the IJ's decision to the Board of Immigration Appeals ("BIA") until seven days after the appeal deadline. He claims that the appeal was not timely filed due to a misunderstanding with his representative.

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[3] The parties have submitted what appears to be a copy of the handwritten record of Gorsira's birth in the Register of Births in District No. Eight, Division Georgetown, Guyana. A block on that form is labeled "Signature, Qualification and Residence of Informant." The block contains the following: "Sgd. A. Gorsira (Father) Sgd. C. Singh (mother)," and appears to indicate that both parents had signed the original birth certificate.

The BIA dismissed the appeal as untimely.

After mistakenly filing a motion to reopen with the BIA, which dismissed the motion for lack of jurisdiction, Gorsira (represented by new counsel) filed a motion to reopen with the IJ on the basis of ineffective assistance of counsel. On April 18, 2003, the IJ denied the motion, finding that Gorsira was not prejudiced by his representative's failure to file a timely appeal because Gorsira had received a full and fair hearing in the immigration court. On September 12, 2003, the BIA affirmed the IJ's decision without opinion.

Because the court file did not contain several documents necessary for a ruling on the merits, on April 21, 2004, I ordered both parties to supplement the record.[4] Both sides submitted briefs. The transcript containing the initial decision of the IJ at the removal hearing was never located.

Late last year, while his petition for a writ of habeas corpus was pending, Gorsira submitted an Application for Certificate of Citizenship by completing a Form N–600. That application is currently pending.

III. Discussion

A. Subject Matter Jurisdiction

District courts have subject matter jurisdiction to grant writs of habeas corpus to individuals who are being held in custody in violation of the Constitution or laws of the United States, including immigration laws. 28 U.S.C. § 2241.

This court does not have jurisdiction to review purely discretionary decisions by an IJ.

[4] Neither party had provided: (1) the BIA's decision rejecting Gorsira's appeal, (2) the decision of the IJ at Gorsira's initial removal hearing, and (3) any evidence concerning Gorsira's underlying defenses.

United States v. Sol, 274 F.2d 648, 651 (2d Cir. 2001). Legal matters decided by immigration officials, however, have long been within this court's jurisdiction, so that the court can ensure that a detained alien receives due process of law. *See Gegiow v. Uhl*, 239 U.S. 3, 9 (1915). The Second Circuit has recently stated that "Article III courts continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders." *Calcano-Martinez v. INS*, 232 F.3d 328, 337 (2d Cir. 2000).

When denying the motion to reopen, the IJ determined that Gorsira's late-filed appellate brief contained no meritorious arguments, thus making a legal determination not a discretionary decision. Legal matters decided by the IJ fall within this court's jurisdiction. The Respondents concede that, because the IJ considered the merits of Gorsira's claims in denying the motion to reopen, the IJ made a legal determination, which this court has jurisdiction to review.

Gorsira's petition requires me to address an additional jurisdictional question. Nationality claims brought in the context of judicial review of orders of removal are governed by 8 U.S.C. § 1252, which provides that nationality claims must be brought initially in the court of appeals:

> (b) Requirements for review of orders of removal.
>
> ***
>
> (5) Treatment of nationality claims.
>
> (A) Court determination if no issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.
>
> (B) Transfer if issue of fact. If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material

> fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.
>
> (C) Limitation on determination. The petitioner may have such nationality claim decided only as provided in this paragraph.

8 U.S.C. § 1252(b). The requirements of section 1252(b)(5) raise the question whether nationality claims can be considered by a district court reviewing a petition for a writ of habeas corpus.

The Ninth Circuit has held that section 1252(b)(5) provides the "*exclusive* means of determining U.S. citizenship for aliens in removal proceedings." *Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (emphasis added). By contrast, the Fourth Circuit reversed a district court order transferring to the Court of Appeals a habeas petition in which the petitioner asserted a claim of nationality. *Dragenice v. Ridge*, 389 F.3d 92 (4th Cir. 2004) (relying on *INS v. St. Cyr*, 533 U.S. 289 (2001), and concluding that district court maintained jurisdiction over habeas proceeding involving nationality claim despite section 1252(b)(5)). Moreover, the Ninth Circuit recently limited *Taniguchi* and held that a district court did have jurisdiction to consider a non-frivolous citizenship claim in a habeas proceeding. *Rivera v. Ashcroft*, 394 F.3d 1129 (9th Cir. 2005). Finally, the Third Circuit just reversed a district court's denial of a habeas petition, in which an alien asserted a claim of derivative citizenship. *Bagot v. Ashcroft*, __ F.3d __, 2005 WL 325853, *13 (3d Cir. Feb. 11, 2005). Although the court did not discuss the effect of section 1252(b)(5), it noted that the district court had jurisdiction pursuant to section 2241 and remanded the matter to the district court "with directions to issue a writ of habeas corpus." *Id.* at *2, *13.

Although the Second Circuit has not clearly confronted the question, in a decision issued last year, the Second Circuit referenced an order in which it ruled that a district court lacked jurisdiction to consider the petitioner's nationality claim in a habeas proceeding. *Langhorne v. Ashcroft*, 377 F.3d 175, 177 (2d Cir. 2004). The *Langhorne* court cured the jurisdictional problems presented there by "deeming the petition transferred" from the district court and "construing it as a petition for review under section 1252(b)(5)(A)."[5] *Id.*

Citing section 1252, several district courts in the Second Circuit have declined to exercise jurisdiction over claims of citizenship in habeas corpus proceedings, instead transferring the claims to the Court of Appeals. *See, e.g., Marquez-Almanzar v. Ashcroft*, 2003 WL 21283418 (S.D.N.Y. June 3, 2003); *Cartagena-Paulino v. Reno*, 2003 WL 21436224 (S.D.N.Y. June 20, 2003). *But see Lee v. Ashcroft*, 2003 WL 21310247 (E.D.N.Y. May 23, 2003) (noting historical distinction between judicial review and habeas corpus and holding that, because section 1252(b)(5) does not expressly repeal habeas corpus jurisdiction, the district court retains habeas jurisdiction over petitioner's nationality claim).[6]

Essentially for the reasons explained in *Dragenice*, I believe habeas jurisdiction exists over Gorsira's nationality claim. In *Dragenice*, the Fourth Circuit concluded that neither section 1252(b)(5) nor any other statute divested district courts of habeas jurisdiction involving

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[5] In this case, the Respondents have not moved to transfer and have argued that this court "cannot transfer Petitioner's citizenship claim to the Court of Appeals because, even if transferred, the Court of Appeals could not review the claim." Gov't Response to Court's Order (doc. # 18) at 11. The Respondents base their position on Gorsira's failure to timely appeal the IJ's decision. *Id.* at 12.

[6] The decision in *Lee* is currently on appeal to the Second Circuit; oral arguments were held on October 8, 2004.

nationality claims. 389 F.3d at 98-99. The court considered the effect of 8 U.S.C. § 1252(a)(2)(C), which provides that no court has jurisdiction to review final orders of removal against aliens who have been convicted of a qualifying offense. *Id.* at 97. The court concluded that, if Dragenice had filed a petition for review from the final removal order, the court would not have been able to decide his nationality claim because the removal order was grounded on Dragenice's commission of a qualifying offense. *Id.* at 100. "Because section 1252(a)(2)(C) denies judicial review when the alien has committed a qualifying crime, there is no other judicial forum to review his nationality claim, and habeas review must remain available." *Id.* (citations omitted).

As in *Dragenice*, Gorsira's final removal order is based in part on his conviction of a qualifying offense under 8 U.S.C. § 1227(a)(2)(B) (a controlled substance offense). Because under 8 U.S.C. § 1252(a)(2)(C) he appears to be ineligible for judicial review of his final removal order, the habeas proceeding remains the only forum for the determination of his citizenship claim. Accordingly, I conclude that, when a habeas proceeding provides the only means by which a person can obtain judicial review of the merits of a nationality claim, section 1252(b)(5) does not bar consideration of a nationality claim raised in a habeas petition. Thus, I believe the court possesses jurisdiction over Gorsira's nationality claim in this habeas proceeding, and I will reach the merits of the petition.

B. Standard of Review

Legal conclusions of the BIA and IJ are reviewed *de novo*. *Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003).

C. Burden of Proof

The burden of proof in removal or deportation proceedings is on the government. *Zhang v. Slattery*, 55 F.3d 732, 752 (2d Cir. 1995). Once the government has produced proof of foreign birth, however, the burden shifts to the individual to prove his citizenship. *Fabregas v. INS*, 2004 WL 1842773, at *1 (2d Cir. Aug. 17, 2004) (citing *United States ex rel. Barilla v. Uhl*, 27 F. Supp. 746, 746-47 (S.D.N.Y. 1939), *aff'd per curiam*, 108 F.2d 1021 (2d Cir.1940));[7] *Bernardo v. United States of America*, 2004 WL 741287, at *2 (N.D. Tex. Apr. 5, 2004). *See also Bagot*, 2005 WL 325853 at *4 (citing *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967)) (proof of eligibility for citizenship is on the applicant; doubts should be resolved in favor of the United States and against the claimant).

D. Petitioner's Claim of Derivative Citizenship[8]

1. *8 U.S.C. § 1432*

The parties do not dispute that Gorsira was born in Guyana, and a copy of the record from the Register of Births has been provided to the court. The burden of establishing citizenship,

[7] I recognize that the unpublished decision in *Fabregas* is not binding authority and that under the rules of the Second Circuit it may not be cited to any court as precedent. 2d Cir. R. § 0.23. Nevertheless, given the lack of precedent in the Second Circuit on this question, *Fabregas* provides helpful guidance.

[8] The derivative citizenship claim was not artfully set out in the habeas petition. Gorsira's petition for habeas corpus and stay of removal was a short document, which incorporated an "accompanying memorandum." The accompanying memorandum in turn incorporated an appellate brief that had been prepared during the underlying removal proceedings. Although the petition and memorandum stated that Gorsira was a "citizen of Guyana" without mentioning his claim of derivative citizenship, the brief did present his arguments concerning his United States citizenship. Throughout the proceeding before this court, both parties have based their arguments on the presence of Gorsira's citizenship claim in his petition for habeas corpus. In addition, during a hearing on December 20, 2004, Gorsira's counsel confirmed that he was seeking a declaration of Gorsira's derivative citizenship.

thus, shifts to Gorsira. He asserts United States citizenship by operation of law under INA section 321(a), former 8 U.S.C. § 1432, which was in effect at the time of his mother's naturalization.[9] The relevant subsections provide:

> Section 1432. Child born outside of United States of alien parents; conditions for automatic citizenship.
>
> (a) A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:
>
> * * *
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
>
> (4) Such naturalization takes place while such child is under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent . . . naturalized under clause . . . (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

8 U.S.C. § 1432(a) (repealed 2000).

To reiterate, it is undisputed that Gorsira was born out of wedlock; he entered the United States on an immigrant visa at age eight; he was under eighteen, living in the United States as a legal permanent resident, and in his mother's sole custody when she was naturalized. The parties also agree that the man listed on Gorsira's birth certificate is his biological father.

The parties contest, however, whether Gorsira's "paternity has . . . been established by

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[9] Alternatively, Gorsira claims that he has derived citizenship under the Child Citizenship Act, 8 U.S.C. § 1431, which he argues is retroactive. The Second Circuit, however, has held that the Child Citizenship Act does not apply retroactively. *Drakes v. Ashcroft*, 323 F.3d 189, 191 (2d Cir. 2003).

legitimation." 8 U.S.C. § 1432(a)(3) (repealed 2000). The Respondents submit that Gorsira is not eligible for derivative citizenship under section 1432 because his father is named in the Register of Birth's record of his birth and that the Guyanese Children Born Out of Wedlock (Removal of Discrimination) Act, No. 12 (1983) ("Removal of Discrimination Act") eliminated all legal distinctions between legitimate and illegitimate children.[10] The Respondents do not suggest any other reason that Gorsira is ineligible for derivative citizenship. Gorsira, however, maintains that the Removal of Discrimination Act merely removed any grounds for discrimination between legitimate and illegitimate children in Guyana and that, because his parents never married, paternity was not established by legitimation.

2. *Legitimation and the Guyanese Removal of Discrimination Act*

To determine if an individual qualifies for derivative citizenship under 8 U.S.C. § 1432(a)(3), the court considers whether paternity has been established by legitimation under the laws of the child's native country.[11] *See Weddernburn v. INS*, 215 F.3d 795, 797 (7th Cir. 2000)

[10] Oral arguments on Gorsira's petition for habeas corpus took place on December 20, 2004. At that time, I requested that both parties attempt to locate Guyana's Removal of Discrimination Act. To date, neither party has provided the court with the statute. Thanks to the research efforts of the library of the District Court of Connecticut, I have been able to review the Removal of Discrimination Act; the Infancy Act (Cap. 46:01) and the Legitimacy Act (Cap. 46:02), which were amended by the Removal of Discrimination Act; and a 1990 memorandum opinion ("Legitimation in Guyana") prepared by a senior legal specialist at the Law Library of Congress. The Guyanese statutes and the Law Library of Congress memorandum are attached as an appendix to this decision. I note that the Removal of Discrimination Act appears to cite 1978 versions of the Infancy and Legitimacy Acts, whereas the versions I reviewed date to 1975 and 1973 respectively. According to the Law Library of Congress, the Infancy Act was not modified after 1975 and the Legitimacy Act was not modified after 1973, prior to the enactment of the Removal of Discrimination Act.

[11] With respect to derivative citizenship claims under section 1432(a)(3), some courts have discussed legitimation under the laws of both a petitioner's native country and the state where he resided. *E.g.*, *Barthelemy v. Ashcroft*, 329 F.3d 1062, 1067-68 (9th Cir. 2003)

(concluding that, under Jamaican law, father's adding his name to birth certificate legitimated child residing in Jamaica). Historically, under the laws of Guyana, legitimation of a child required the marriage of his parents. *See Matter of Gouveia*, 13 I. & N. Dec. 604 (BIA 1970), 1970 WL 18746 (BIA Aug. 7, 1970).

In 1983, the Removal of Discrimination Act repealed Guyana's Bastardy Act and amended four other statutes, including the Infancy Act and the Legitimacy Act. Its apparent purpose was to remove statutory discrimination and to provide children born out of wedlock with the same rights available to children born in wedlock.

The BIA has addressed the Removal of Discrimination Act and its effect on the status of children born out of wedlock. *Matter of Goorahoo*, 20 I. & N. Dec. 782, 783 (BIA 1994), 1994 WL 58716 (BIA Feb. 9, 1994).

In *Goorahoo*, the BIA considered whether a citizen of Guyana, who was a United States legal permanent resident, could petition for a visa for his minor son using the beneficiary preference status available under section 203(a)(2) of the INA, 8 U.S.C. § 1153(a)(2) (1988).[12]

(petitioner's concession that father legitimated him was correct under both Haiti and California law); *Charles v. Reno*, 117 F. Supp. 2d 412, 417 (D.N.J. 2000) ("It is undisputed that Petitioner was legitimated under Haiti and New Jersey law."). It is possible to imagine circumstances where the laws of the child's native country are not determinative, for example, if both parents have emigrated and legitimation occurred elsewhere. In this case, however, neither party has argued that the laws of Guyana are not determinative, and there is no evidence of legitimation in the United States.

[12] The record before the BIA included a memorandum opinion from a senior legal specialist at the Law Library of Congress, and the BIA relied on the analysis set forth there. I have located a copy of the memorandum ("Legitimation in Guyana") referenced in *Goorahoo*. The memorandum is included in the appendix to this opinion. I note that the date mentioned in *Goorahoo* (January 16, 1986) differs from the date listed on the memorandum that I have received (February 1990). According to memorandum's author, however, the memorandum that I received is the same one cited by the BIA in *Goorahoo*.

Although the child had been born out of wedlock, his birth certificate reflected the petitioner as his father. In addition, an affidavit signed by the child's mother attested that the petitioner had acknowledged paternity of the child and that the petitioner was regularly involved in the child's maintenance and upbringing.

The petition for a visa using beneficiary preference status required the BIA to consider whether the boy qualified as the petitioner's "child" within the meaning of section 101(b)(1) of the INA, which provided the relevant definition:

> (1) The term "child" means an unmarried person under twenty-one years of age who is –
>
> (A) a legitimate child;
>
> * * *
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

8 U.S.C. § 1101(b)(1) (1988) (amended).

Because the petitioner's son had been born out of wedlock, the BIA considered whether he was an eligible "child" under 8 U.S.C. § 1101(b)(1)(C). The BIA relied on a memorandum from the Law Library of Congress, which discussed legitimation in Guyana, in particular the effect of the Removal of Discrimination Act on the status of children born out of wedlock. That memorandum remarked that although the Act:

> does not establish a general rule that children are to be regarded as being of equal status regardless of whether they have been born to married or unmarried parents, it did amend a number of extant enactments to eliminate references to illegitimacy and to give all children equal rights under them.

Law Library of Congress Memo at 4.

One Guyanese statute amended by the Removal of Discrimination Act and of particular importance to the issue in *Goorahoo* is the Infancy Act, which deals principally with contracts by minors, guardianship, and custody rights. As amended, the Infancy Act provided the following definitions of "infant" and "father":

> 1A. In this Act –
>
> (a) "infant" means any person who is a minor, whether born in wedlock or out of wedlock;
>
> (b) "father," in relation to an infant who is born out of wedlock, means –
>
> > (i) the man who has been adjudged to be the father of the infant by a court of competent jurisdiction; or
> >
> > (ii) if there is no such man, *the man who has acknowledged the infant to be his child, and has contributed towards the maintenance of the infant*, before he exercises or seeks to exercise in respect of the infant any rights or functions conferred on the father of an infant by any provision of this Act.

Removal of Discrimination Act § 2 (Schedule), *amending* Infancy Act, Cap. 46:01 § 1A (emphasis added).

Significantly, in *Goorahoo*, the child's biological father was before the court, petitioning for beneficiary preference status. He had acknowledged his son as his child and had regularly contributed to his son's maintenance and upbringing. Thus, the petitioner in *Goorahoo* would have qualified as his "father" under Guyana's amended Infancy Act and had custody rights. Without discussing the Infancy Act, the BIA ruled that the petitioner's son qualified as his legitimated child under section 1101(b)(1)(C). 20 I. & N. at *785.

The Respondents here rely heavily on the fact that, in *Goorahoo*, the BIA modified its

decision in *Gouveia* and stated that:

> Guyana has eliminated all legal distinctions between legitimate and illegitimate children. Thus, children born out of wedlock in Guyana after May 18, 1983, which is the effective date of the Removal of Discrimination Act, and children who are under the age of 18 prior to that date are deemed legitimate and legitimated children, respectively.

Id. This statement was unnecessary to the decision in *Goorahoo* and overly broad.

The Removal of Discrimination Act did eliminate many existing legal distinctions between legitimate and illegitimate children. *See* Law Library of Congress Memo at 4. The Act also replaced the term "illegitimate" with the term "born out of wedlock" in several statutes and amended particular acts in order to remove provisions that discriminated against children born out of wedlock or their parents, for example, with respect to inheritance and custody rights. *See* Removal of Discrimination Act § 2 (Schedule), *amending* Civil Law of Guyana Act, Cap. 6:01 § 5 (intestate succession); *id. amending* Infancy Act, Cap. 46:01 § 10A (custody rights).

The Removal of Discrimination Act did not, however, include any broad provisions eliminating all distinctions between illegitimate and legitimate children (or between children born in wedlock and out of wedlock). The author of the Law Library of Congress memorandum concluded that the Act "does not attempt to generally abolish the legal distinction between legitimate and illegitimate children." Law Library of Congress Memo at 5.[13] In fact, one

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[13] I note that Guyana's 1980 Constitution does include the following provision:

> Children born out of wedlock are entitled to the same legal rights and the same legal status as are enjoyed by children born in wedlock. All forms of discrimination against children on the basis of their being born out of wedlock are illegal.

Constitution of the Co-operative Republic of Guyana Act, 1980, Guy. Laws. ch. 2, ¶ 30, *available at* http://www.georgetown.edu/pdba/Constitutions/Guyana/guyana96.html. As noted in

significant distinction remained in Guyana's laws after the Removal of Discrimination Act: a child born out of wedlock could only be legitimated through the subsequent marriage of his parents. Legitimacy Act, Cap. 46:02 § 3 (1975), *amended by* Removal of Discrimination Act, § 2 (Schedule). The Legitimacy Act was not amended to provide alternative means of legitimation.[14]

Even if *Goorahoo*'s discussion of Guyanese law had been entirely accurate, Respondents' reliance on it would be misplaced. *Goorahoo* did not consider the effect of the Removal of Discrimination Act on claims of derivative citizenship under section 1432. In *Goorahoo*, the BIA considered beneficiary preference status for visas, specifically the definition of "child" under 8 U.S.C. § 1101(b)(1). The Second Circuit has described the statutory context within which visa preferences are made available and noted that the preference system was "primarily designed to further the basic objective of reuniting families. . . ." *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (citing S.R. No. 748, 89th Cong., 1st Sess. 13, reprinted in (1965) U.S. Code Cong. & Admin. News 3328, 3332).

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the Law Library of Congress memorandum, Chapter II of the Constitution is captioned "Principles and Bases of the Political, Economic, and Social System" and concludes with a section, stating that Parliament "may provide for any of those principles to be enforceable in any court or tribunal." *Id.* § 39 (amended 1988). Section 39 suggests that the provisions of Chapter II were intended to serve merely as goals "that the National Assembly was obliged to try to help Guyana reach through the enactment of appropriate legislation." Law Library of Congress Memo at 3.

[14] The broadest reading of Guyana's Removal of Discrimination Act and the amended Infancy and Legitimacy Acts arguably provides two additional means of establishing paternity through legitimation of a child born out of wedlock. In addition to marrying the child's mother, a man may be able to establish his paternity through legitimation if he has either (a) been adjudged to be the child's father by a court, or has (b) acknowledged the child as his own and has contributed towards the maintenance of the child. Removal of Discrimination Act § 2 (Schedule), *amending* Infancy Act, Cap. 46:01 § 1A.

The provision of the derivative citizenship statute at issue here reflects a different goal of Congress: the protection of parental rights. *See Barthelemy v. Ashcroft*, 329 F.3d 1062, 1066 (9th Cir. 2003). "If United States citizenship were conferred to a child where one parent naturalized, but the other parent remained an alien, the alien's parental rights could be effectively extinguished." *Id.* (citing *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000) and *Wedderburn*, 215 F.3d at 800). In effect, section 1432 "prevents the naturalizing parent from usurping the parental rights of the alien parent." *Id.* The exceptions available in sections 1432(a)(2)-(3) reflect Congress' recognition of circumstances in which this general rule precluding derivative citizenship when only one parent naturalizes is overly broad. *Id.* The alien parent's rights are not of concern, if, for example, the alien parent is deceased or if the alien, biological father has not legitimated the child.

In short, in section 1153, Congress sought to further the goal of family reunification; by contrast, in section 1432, Congress aimed to protect the rights of alien parents. In *Goorahoo*, the BIA considered 8 U.S.C. §§ 1153(a)(2) and 1101(b)(1) and held that the son qualified as the petitioner's child for purposes of a beneficiary preference status visa. I am considering the former 8 U.S.C. § 1432 and whether Gorsira's paternity has been "established by legitimation."

The parties agree that the father's signature on Gorsira's birth certificate, which presumably constituted recognition of paternity, did not constitute *legitimation* at the time of the birth. The Respondents point only to the Removal of Discrimination Act to argue that Gorsira was later legitimated by operation of law. In fact, even after passage of the Removal of Discrimination Act, the Legitimacy Act continued to provide that marriage of the child's parents was the sole means of legitimation under Guyanese law:

> 2. In this Act –
>
> "date of legitimation" means the date of the marriage leading to the legitimation;
>
> * * *
>
> "legitimated person" means a person legitimated by this Act;
>
> * * *
>
> 3. (1) Subject to this section, where the parents of [a person born out of wedlock] marry or have married one another, whether before or after the commencement of this Act, the marriage did or shall, if the father of the [person born out of wedlock] was or is at the date of the marriage domiciled in Guyana, render that person, if he is or was living, legitimate from the date of the marriage.

Legitimacy Act, Cap. 46:02, §§ 2-3 (1975) *amended by* Removal of Discrimination § 2 (Schedule) (amendments reflected in brackets). The Removal of Discrimination Act amended the Legitimacy Act in only two ways: replacing the term "illegitimate" with the term "born out of wedlock" and expanding intestate succession rights.

For purposes of beneficiary preference status visas, the United States may consider all children born in Guyana either legitimate or legitimated because the Removal of Discrimination Act appears to have granted to children born out of wedlock the same rights of children born in wedlock. *Cf. Lau*, 563 F.2d at 550-51 (distinguishing paternity proceeding from legitimation and holding that for purposes of 8 U.S.C. § 1101(b)(1) all children born in China are "legitimate children" because of legislative grant of legitimacy to all persons). Section 1432, however, requires me to consider whether "paternity has . . . been established by legitimation" under the laws of Guyana. The Removal of Discrimination did not legitimate Guyanese children who were born out of wedlock, nor did it provide that a father's acknowledgment of paternity was sufficient

to establish paternity, legitimate a child, or affect the father's custodial rights.[15]

My reading of the Guyanese statutes is buttressed by the 1990 Law Library of Congress memorandum, which concluded that "Guyana still has a Legitimacy Act that only provides for the legitimation through the subsequent marriage of a child's natural parents." Law Library of Congress Memo at 4. In addition, the author noted that "[t]here are no provisions in the laws of Guyana for the legitimation of a child through recognition. Therefore, the fact that [a] putative father's name appears on the subject's birth certificate does not affect [the child's] status." *Id.* at 5, n.5.[16]

Furthermore, the memorandum compared Guyana's Removal of Discrimination Act with Status of Children Acts passed in common law jurisdictions in the Caribbean. *Id.* at 3. Those statutes have purported to abolish the legal distinctions between legitimate and illegitimate children for purposes *other than* for determining citizenship and domicile. *Id.* The Removal of Discrimination Act was *less broad* than the Status of Children Acts, which themselves did not abolish distinctions between legitimate and illegitimate children for purposes of citizenship.

In sum, the Removal of Discrimination Act did not equate recognition of paternity with legitimation. Even following its enactment, paternity could be established by legitimation in

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[15] At least one member of the BIA has likewise applied section 1432 and concluded that, despite *Goorahoo*'s interpretation of the Guyanese Removal of Discrimination Act, the Act does not provide a means of establishing paternity or legitimation through mere acknowledgment. *In re Brian Anthony Johnson*, 2004 WL 880245 (BIA Mar. 9, 2004) (Cole, dissenting).

[16] One of the memorandum's conclusions, that "a strong case can be made" that Guyana's Removal of Discrimination Act should be interpreted as effectively legitimating all children born to unmarried parents, seems inconsistent with the memorandum's legal analysis. Law Library of Congress Memo at 5. In any event, even if accurate, that statement has no bearing on whether Gorsira's paternity was established by legitimation under Guyanese law.

Guyana only upon the marriage of the child's biological parents.

3. *Gorsira's Claim of Citizenship*

The facts in the record are undisputed. Gorsira was born out of wedlock, and his parents never married. He immigrated to the United States at age eight. His mother was naturalized on December 13, 1991, when Gorsira was seventeen years old, in his mother's sole custody, and living in the United States as a lawful permanent resident. With respect to paternity, Gorsira has stipulated that the man who signed his birth certificate is his biological father. Gorsira was never in the custody of his father, however, and his father has never provided maintenance or support. Gorsira's biological father would not have qualified as his "father" under the Infancy Act; thus, protection of his father's paternity rights would not be a goal of the statutory limits on derivative citizenship.

Although it removed legal distinctions between children born out of wedlock and children born to married parents, Guyana's Removal of Discrimination Act did not permit fathers who merely acknowledged paternity to exercise parental rights and it did not equate acknowledgment of paternity with legitimation. In fact, the Removal of Discrimination Act amended Guyana's Legitimacy Act, which continued to provide only one means of legitimation: marriage of the child's parents. Accordingly, despite his father's apparent acknowledgment of paternity, because Gorsira was born out of wedlock and his parents never married, Gorsira's paternity was never established *by legitimation* under the laws of Guyana. Therefore, he derived citizenship under the former 8 U.S.C. § 1432(a) upon the naturalization of his mother.

IV. Conclusion

Gorsira derived citizenship through the naturalization of his mother when he was

seventeen, living in the United States as a permanent resident, and in her sole legal custody. As a citizen, he is not removable, and must be released from custody.[17]

Gorsira's petition for a writ of habeas corpus (doc. # 1) is GRANTED. The Respondents shall release him from custody forthwith. The clerk shall enter judgment and close the file.

It is so ordered.

Dated at Bridgeport, Connecticut, this 16th day of February 2005.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge

[17] Gorsira's petition reached this court on a claim of ineffective assistance of counsel. The IJ rejected that claim because he concluded that, since Gorsira's appellate brief contained no meritorious arguments, he was not prejudiced by the alleged ineffective assistance of counsel. For the reasons set forth in this decision, I conclude that Gorsira was prejudiced by the late filing of the appeal. Because, as a matter of law, Gorsira is a United States citizen, there is no point in remanding Gorsira's petition to the BIA or IJ for further proceedings.