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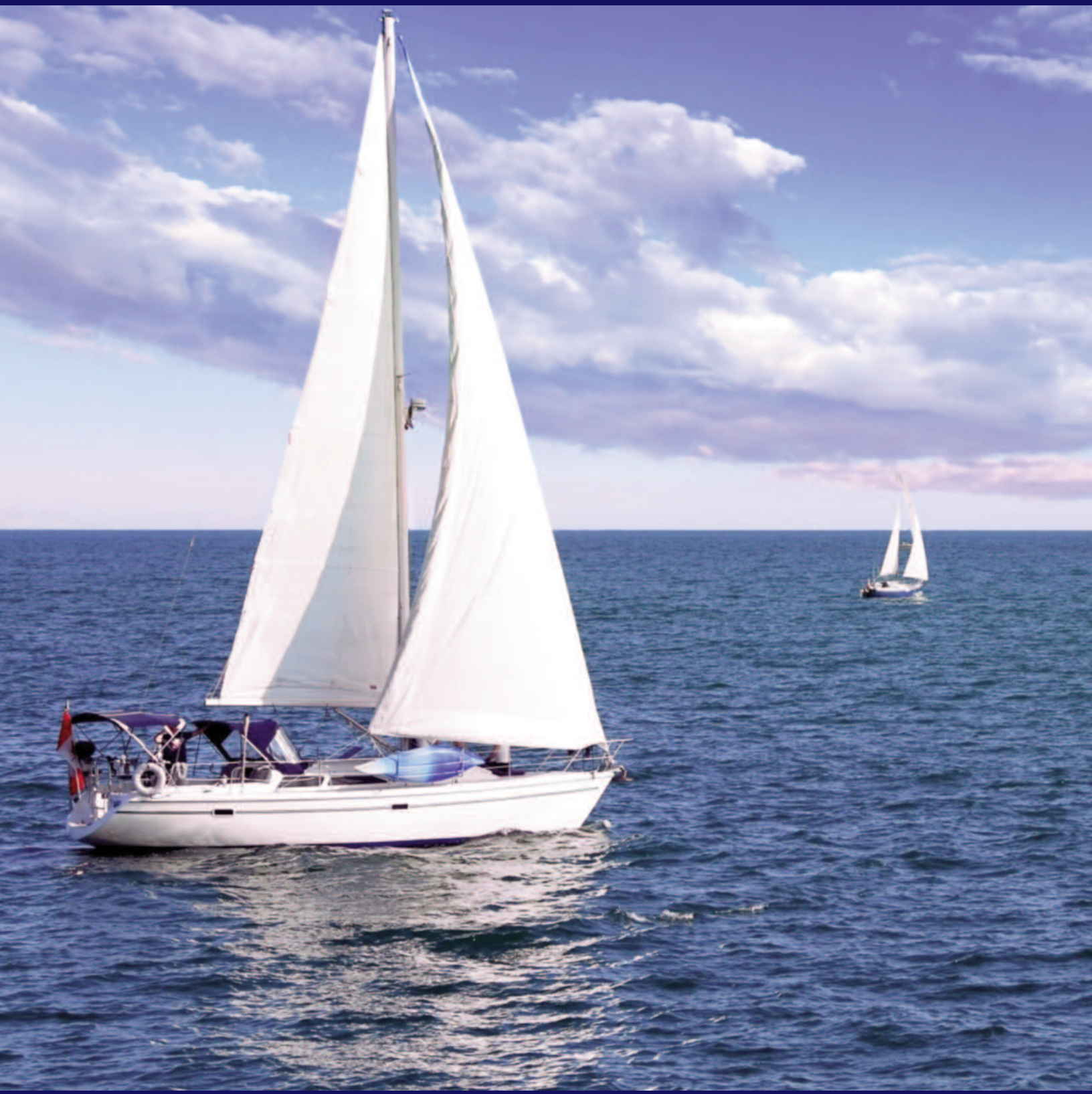

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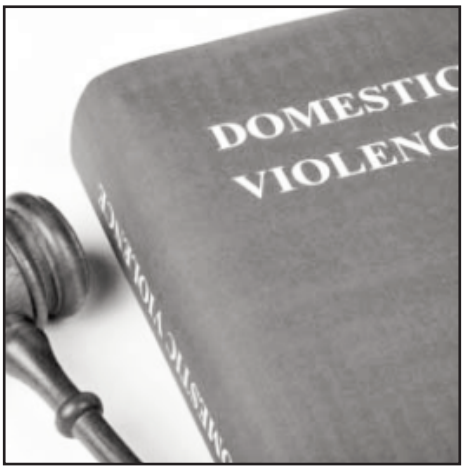
A Red Flag: Orders of Protection and Deportability for Resident Aliens

By Patrick M. Kinnally, Esq.

Domestic violence in the United States, it seems, is not only everywhere, but borders on being a sociological symptom. Physical attacks, unfortunately, have become an unwelcome element of many domestic relationships. Some victims believe abuse is a normal part of the relationship or they are embarrassed about the abuse. Others feel the abuser will change, or the abuse will escalate if s/he tries to leave. Here are some sobering statistics:

- Domestic violence affects more than 12 million people a year.
- 1 in every 4 women and 1 in 7 men aged 18 and older in the United States have been the victim of severe physical violence by an intimate partner in their lifetime.
- 1 in 7 women have been stalked.
- Domestic violence accounts for 15% of all violent crime.
- Domestic violence is most common among women between the ages of 18-24.
- Most female victims of intimate partner violence were victimized previously by the same offender, including 77% of females ages 18-24, 76% of females 25-34, and 81% of females 35-49.
- A woman is assaulted or beaten every 9 second is the United States.[1]

In Illinois, orders of protection can be issued in criminal, civil and independent proceedings under the Illinois Domestic Violence Act, 750 ILCS



60/101, 750 ILCS 60/214 ("DVA").[2] And, in a wide variety of contexts, including, but not limited to: dissolution of marriage[3]; disabled adult proceedings[4]; juvenile court actions[5]; no contact orders under Illinois Civil Liability Statutes[6]; and the Gender Violence Act[7], to name a few. Their objective is to confront domestic violence.

For example, in ***People v. Leezer***, 387 III.App.3d 446 (4th Dist. 2008)("*Leezer*"), the defendant was charged criminally with violation of a civil order of protection (OP). The underlying OP was prepared on a preprinted form which is utilized throughout the State of Illinois. It provided that the defendant was required to "stay away" from the plaintiff and her daughter. The defendant was convicted after a jury trial. The defendant filed a Motion for Judgment notwithstanding the verdict where he argued that the mere fact of his operating a motor vehicle within 1000 feet from plaintiff's residence was not a violation of the Illinois Criminal Code. The trial court agreed.

The Appellate Court reversed, observing that the purpose of the DVA is to reduce the abuser's access to the victim so victims are not trapped in abusive relationships, and to expand the criminal remedies available to the abused person. It found that the "stay away" provision was appropriate, even if the allegations of the charge were to stay away from the plaintiff's residence as opposed to her person. The Court found the statute covered both situations. It took a broad view of what constituted a violation of an OP.[8]

Leezer is not a relic. In an extensive, well-researched opinion, Justice Hyman recently held a trial court abused its discretion when Elisa Sanchez sought and proved that her spouse, Juan Ramirez Torres, engaged in abusive conduct toward her. After a two-day hearing where Torres denied the allegations and the trial judge found Sanchez credible, it issued a "civil restraining order", not a two year plenary order of protection.[9] The Appellate Court held that if the Petitioner proves she was abused, then under the DVA, an order of protection "shall issue".[10] This legislative statement, the Court held, was not directory, but mandatory. A civil restraining order was not a substitute. In this context, abuse is defined broadly and includes physical abuse, harassment, interference with personal liberty or willful deprivation.

Violation of an OP has dire consequences, including criminal penalties, which include criminal misdemeanor convictions and, in some instances, felony convictions.[11] Additionally, an OP requires automatic registration with law enforcement agencies via the LEAD system. Civil restraining orders contain none of these safeguards, including firearm ownership. The Appellate Court

reversed the trial court and ordered it to enter a plenary order of protection in favor of Ms. Sanchez.

Because of its ubiquity, domestic violence has ramifications for lawful permanent resident aliens and other immigrants living in our community. Recent case law shows what may amount to misdemeanor or perhaps civil violations of protection orders may have far-reaching consequences on an individual's immigration status, including removal from the United States.[12]

The Immigration and Nationality Act[13] states, in pertinent part:

> (a) Classes of deportable aliens
> Any alien ... in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:
> . . .
>
> (2) Criminal offenses
> . . .
>
> (E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and
>
> (ii) Violators of protection orders
>
> Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates *the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued* is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

This provision, under a straightforward reading of the text, comes under the general rubric of "criminal offenses"; but the portion highlighted indicates a more expansive statutory prohibition, namely, a resulting deportable offense occurs where there is violation of ". . . a portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable . . ." That is a wide moat.

What "involves protection" is not a clear statement, nor is it apparent at or to what level a threat of violence must rise to create an abrogation of the statutory precept. Notwithstanding, the law seems clear that an OP does not look at history, but what it can prevent from happening in the future[14] or, in other words, to prevent violence in most cases, the domestic type, from what might take place. Should that determination rest on a narrow or a capacious view of the statutory language? It seems to be the former.

The Executive Officer for Immigration Review (EOIR), through its Board of Immigration Appeals (BIA), takes an attenuated view of the statute, resulting in a more likely finding of removability where an OP is violated.[15]

Rupert Strydom, a lawful permanent resident, was ordered by a Kansas State court not to contact his wife pending a hearing concerning her request for an OP against alleged domestic abuse by him. This appears to have been a civil proceeding. He violated the order and was convicted under a Kansas statute. He was charged with being removable for violating an OP.[16]

During his removal hearing, Strydom argued his conviction did not establish he did anything violent other than personally contacting the victim verbally, not in any threatening manner. In doing so, he admitted violating the 'no contact' provision of the order and the statute. In Strydom's state court proceeding, his conviction did not say which portion of the statute he violated. The statute covered a wide array of conduct, including stalking, a restraining order in dissolution of marriage proceedings, an order issued in connection with pretrial release, etc.[17] It covered offenses which were removable ones, as well as those which were not.[18]

The BIA, in analyzing the order entered against Strydom, found it was entered to prevent domestic abuse. To the BIA, the nature of the abuse or its acuity made no difference. The BIA found Strydom's argument unpersuasive. It held that the purpose behind the Kansas statute is to make abusers "stay away" from their victims. Relying on *Alanis-Alvarado* and *Szalai v. Holder*,[19] it observed there is no requirement that a person like Strydom actually engage in violent, threatening or harassing behavior. According to the BIA, it only requires a violation of that portion of an OP that involves protection against credible threats of such conduct.[20]

The Court of Appeals in *Cespedes*, followed this view rejecting an argument that *Strydom* was wrongly decided. It held Ramon Cespedes pled guilty to the attempted violation of an OP under a Utah statute which prohibited contact with his spouse. To arrive at that result, it deferred to the BIA's interpretation of the statute. It did so because it was constrained to make its own independent analysis under *Chevron USA v. Natural Resource Defense Council*,[21] Under the latter, if a congressional statue is ambiguous a reviewing court only ascertains whether the administrative agency, here the BIA's, construction of the statute is permissible. If it is, it defers to its interpretation. In

Cespedes, the court indicated it might have decided the issue differently since there was room for debate about the meaning of "the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury". It noted that the phrase "involves protection" could be interpreted broadly or narrowly. Because the BIA took the latter view did not make it impermissible.[22] It appears the same result would occur in Illinois given the outcome of *Leezer* and *Sanchez*. As such, practitioners should, if possible, make clear in any state court plea agreement for violation of an OP that any subsequent conviction rests on a finding of no violent contact, or threats of repeated harassment.

It seems unlikely when Congress passed the removability statute it had in mind that a non-threatening telephone call or a nonviolent conversation would result in a lawful permanent resident being deported. If that had been its mindset in passing this statute it would have stated that "any" violation of a protection order would result in the violator being removed. That makes clear the conduct required to make a state court offense a deportable one under Federal law. Instead, it used the words "portion of a protective order ... that involved protection against credible threats ..." which has resulted in administrative tribunals defining state laws in the shroud of a federal removability offense.

Domestic violence is a societal problem that needs to be addressed in a substantive way. We all support that. Yet, I believe, respectfully, *Cespedes* and *Strydom* seek to do that from a legal perspective which is quite limited in their interpretations. Congress should go back to the drawing board and make plain what it intended in passing this statute. Domestic violence separates families for sure. But that does not denote necessarily that separation must be made permanent by deportation.

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[1] *See* collectively, National Coalition against Domestic Violence http://www.ncadv.org/learn/statistics; National Domestic Violence Hotline, http://www.thehotline.org/.
[2] *Frank v. Hawkins*, 383 III.App.3d 799 (4th Dist. 2008).
[3] *IRMO Holtorf*, 397 III.App.3d 805 (2d Dist. 2010).
[4] 740 ILCS 60/201.
[5] Hawkins, 383 III.App.3d 799; and *Mowen V. Holland*, 336 III.App.3d 368 (4th Dist. 2003).
[6] 740 ILCS 21, 22.
[7] 740 ILCS 82/1.
[8] *People v. Olsson*, 335 III.App.3d 372, 374-375 (4th Dis. 2002).
[9] *Sanchez v. Torres*, 2016 IL.App. (1st) 151189 (2016).
[10] 750 ILCS 60/214a.
[11] 720 ILCS 5/12-3.4(d).
[12] *Cespedes vs. Loretta Lynch*, (10th Cir. 2015), 805 F.3d 1274.
[13] 8 U.S.C. §1227(a)(2)(E)(ii).
[14] *Alanis Alvarado v. Holder*, 585 F.3d 833 (9th Cir. 2009).
[15] *In re: Strydom* (BIA 2011), 25 I&N Dec. 507.
[16] INA 237(a)(2)(E)(ii).
[17] Kan.Stat.Annot. 21-3843.
[18] *Strydom* at 509.
[19] 572 F3d 975 (9th Cir. 2009).
[20] *Strydom*, at 511, citing *Alanis-Alvarado*, at 839.
[21] 467 U.S. 837 (1984).
[22] *Cespedes*, sl. Op., p. 8.

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