No. 25-20073

United States Court of Appeals
for the Fifth Circuit

MARIBEL SAYEGH DE KEWAYFATI,
PLAINTIFF - APPELLANT
V.
PAMELA BONDI, U.S. ATTORNEY GENERAL; ANGELICA ALFONSO-ROYALS, ACTING DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES; KRISTI NOEM, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; HOUSTON ASYLUM OFFICE DIRECTOR,

DEFENDANTS - APPELLEES
CONSOLIDATED WITH

NO. 25-20101

MARLEN SAYEGH AGAM DE MAARI,
PLAINTIFF - APPELLANT
V.
KRISTI NOEM, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; HOUSTON ASYLUM OFFICE DIRECTOR; PAMELA BONDI, U.S. ATTORNEY GENERAL; ANGELICA ALFORNSO-ROYALS, ACTING DIRECTOR OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES
DEFENDANTS – APPELLEE

BRIEF OF APPELLANT

JAVIER RIVERA,
Rivera and Shirhatti, PC
P.O. Box 848
Houston, Texas 77001
rjriveralaw@gmail.com
(P): (832) 991-1105
Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTERESTED PERSONS

Appellant certifies that the following listed person and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1) **Plaintiff-Appellants:**

Maribel Sayegh de Kewayfati is a non-citizen applicant for asylum.

Marlen Sayegh Agam de Maari is a non-citizen applicant for asylum.

2) **Defendant-Appellee:**

Kristi Noem, Secretary, United States Department of Homeland Security

Kika Scott, Director, United States Citizenship and Immigration Services,

Director of Houston Asylum Office

Pami Bondi, United States Attorney General.

/s/ Javier Rivera
JAVIER RIVERA
Attorney for Plaintiff-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellants request oral argument in their matter as it is one of first impression with this court and the issues presented involve complex questions of constitutional and statutory interpretation. Oral argument will assist the Court in resolving these important questions and clarifying the record.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Federal Cases

Federal Statutes

Rules

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit has jurisdiction over this appeal pursuant to *28 U.S.C. § 1291*, which grants appellate jurisdiction over final decisions of the district courts, here, the Southern District of Texas. The dismissal of the appellants' claims under Federal Rule of Civil Procedure (FRCP) 12(b) constitutes a final decision, as it disposes of all claims in the case. [1]

Federal jurisdiction for the matter is proper under *28 U.S.C. §§ 1331* (federal question) and 1361 (mandamus), *5 U.S.C. § 701* et. Seq. (the Administrative Procedures Act or APA), 28 U.S.C. § 2201 et. Seq. (Declaratory Judgment Act). As a threshold matter in a Civil Action the Court must determine whether it has been stripped of jurisdiction. *8 U.S.C. §§ 1252(a)(5)* and *(b)(9)* prohibit federal district courts from granting relief in actions seeking to challenge final orders of *removal*. The APA, however, allows federal courts to review an agency action that is "made reviewable by statute" or is a "final agency action for which there is no other adequate remedy in court." *5 U.S.C. § 704*. Agency action is not subject to judicial review where the relevant statute precludes such review, or the action is committed to agency discretion by law. *5 U.S.C. § 701(a)(1)-(2)*. "As a matter of jurisdiction, courts may not review the administrative decisions of the INA unless the appellant

[1] Plaintiff Agam de Maari's claim was dismissed solely under FRCP 12(b)(1) for lack of subject matter jurisdiction however Plaintiff Kewayfati had her matter dismissed under 12(b)(6) for failure to state a claim for which relief can be granted

has first exhausted 'all administrative remedies." *Cardoso v. Reno*, 216 F.3d 512, 518 (5th Cir. 2000) (*citing* 8 U.S.C. § 1252(d) (1999)); *see also Velasquez v. Nielsen*, 754 F. App'x 256, 260-61 (5th Cir. 2018). The Plaintiff's matter is not precluded by statute nor is it a decision discretionary in nature therefore this Court holds jurisdiction.

ISSUES PRESENTED

1. Does a federal court have subject-matter jurisdiction to review a denial of an affirmative application for asylum when the applicant holds lawful status and may not seek review before EOIR?
    a. Does USCIS's denial of the Appellants' affirmative asylum application qualify as a final agency action?
2. Did the District Court err when it dismissed the Appellants' petition to review the denial of their asylum applications for failure to state a claim?

STATEMENT OF THE CASE

Both Appellants are sisters and Venezuelan Nationals who filed affirmative asylum applications and currently hold Temporary Protected Status (TPS). Appellant Maribel Sayegh de Kewayfati ("Kewayfati") filed her affirmative asylum application on June 18, 2014. Appellant Marlen Sayegh Agam de Maari ("Maari") filed her affirmative asylum application on June 19. 2014. Venezuela was designated as a country for TPS on March 9, 2021, and then again on October 3, 2023. The

Appellants applied for and were granted temporary protected status for themselves and their families. Kewayfati and Maari are currently under valid TPS.

Appellants Kewayfati and Maari were issued notices of intent to deny (NOID) in response to their asylum applications. (Kewayfati ROA 71-74) (Maari ROA 59-62) Both provided substantive responses but were issued denials for failing to submit sufficient evidence to overcome the proposed grounds for denial in the NOIDs. Because both Appellants and their families held TPS status, their asylum applications were not referred to an immigration judge for adjudication in removal proceedings. (Kewayfati ROA 63-66) Both denials also explicitly stated that there was no appeal from the decision. (Kewayfati ROA 205-206) (Maari ROA 70-80)

Each Appellant initiated a lawsuit in the Southern District of Texas to remedy the Defendants' clear error. In response to the lawsuit, the Defendants filed a motion to dismiss under Federal Rules of Civil Procedure (FRCP) 12(b)(1) and 12(b)(6). (Kewayfati ROA 207-217), (Maari ROA 87-95) Kewayfati's claims were dismissed on the merits under Rule 12(b)(6). (Kewayfati ROA 245-247). Maari's claim was dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1). (Maari ROA 147-148). As the two cases are factually almost identical, the claims have been combined, and this appeal follows.

SUMMARY OF THE ARGUMENT

The underlying facts for both Kewayfati and Maari's asylum applications present compelling cases for their refugee status and should therefore be adjudicated on the merits rather than be procedurally dismissed. The central theme and issue at hand is whether this Court has jurisdiction to exercise judicial review over Plaintiff's affirmative asylum application; namely whether there is a "final agency action" for which the Plaintiff has a proper claim upon which relief can be granted. The answer is a resounding yes.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for a district court's dismissal under *FRCP 12(b)(1)* for lack of subject matter jurisdiction and *FRCP 12(b)(6)* for failure to state a claim is de novo. *Stratta v. Roe*, 961 F.3d 340, 349 (5th Cir. 2020). This court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Id.* This court may consider the complaint along with undisputed facts in the records and any disputed facts resolved by this court. *Id.*

Federal courts are "courts of limited jurisdiction, having 'only the authority endowed by the Constitution and that conferred by Congress. '" *Halmekangas v. State Farm Fire and Casualty Co.*, 603 F.3d 290, 292 (5th Cir. 2010). Under FRCP 12(b)(1), "'[a] case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.'" *Smith v.*

Regional Transit Auth., 756 F.3d 340, 347 (5th Cir. 2014) (quoting *Krim v. pcOrder.com*, Inc., 402 F.3d 489, 494 (5th Cir. 2005).

A motion to dismiss under *FRCP 12(b)(6)* is appropriate only if the plaintiff has not provided fair notice of its claim and factual allegations that- when accepted as true- are plausible and rise above mere speculation. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Generally, motions to dismiss for failure to state a claim are viewed with disfavor. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). When there are non-conclusory factual allegations, the Court must assume that they are true and then determine whether plausibly give rise to an entitlement to relief. *Iqbal*, 556 U.S. at 679.

II. THE APPELLANTS' CASES WERE IMPROPERLY DISMISSED

A. The Federal Courts hold subject-matter jurisdiction over this cause of action.

1. Temporary Protected Status

Pursuant to the Immigration Act of 1990, Pub. L. 101-649, § 302, 104 Stat. 4978, 5030, which is codified in the Immigration and Nationality Act (INA) as *8 U.S.C. § 1254a*, the Secretary of Homeland Security is authorized to designate foreign states experiencing armed conflict, natural disaster, epidemic, or other extraordinary conditions, and to grant TPS to the nationals of designated countries. *8 U.S.C. § 1254a(a)(1), (b)(1)*. Nationals of a designated country can be granted TPS if they have been physically present in the United States since the effective date

of the Secretary's designation and satisfy certain residency, registration, and admissibility requirements. *8 U.S.C. § 1254a(c)*. When the Secretary grants TPS to an individual, the government is prohibited from removing that individual during the period in which such status is in effect and, moreover, is required to authorize the TPS beneficiary to engage in employment. *8 U.S.C. § 1254a(a)(1)*. TPS also provides the beneficiary with the ability to "travel abroad with the prior consent" of the government. *8 U.S.C. § 1254a(f)(3)*. "TPS essentially freezes an alien's position within the immigration system; although it grants the beneficiary present lawful status for its duration, it is not itself a 'pathway to family reunification, permanent residency, or citizenship.'" *Duarte v. Mayorkas*, 27 F.4th 1044,1053 (5th Cir. 2022) (quoting *Dhakal v. Sessions*, 895 F.3d 532, 538 (7th Cir. 2018)). Temporary Protected Status is considered lawful status as a nonimmigrant for purposes of adjustment of status. *Solorzano v. Mayorkas*, 987 F.3d 392, 395 (5th Cir. 2021).

2. Final Agency Action

The Fifth Circuit stated that the finality of an agency action is assessed pragmatically. *Am. Airlines Inc. v. Herman,* 176 F.3d 283, 291 (5th Cir. 1999). This Court then stated five factors to consider when determining the finality of agency actions: (1) the legal and practical effect of the agency action; (2) the definitiveness of the ruling; (3) the availability of an administrative solution; (4) the likelihood of unnecessary review; and (5) the need for effective enforcement of the [Immigration

and Nationality] Act." *Id.* The Supreme Court enumerated two substantively similar factors to determine if an agency action is final: "First, the action must mark consummation of the agency's decision-making process—it must not be of merely tentative or interlocutory nature. . . And second, the alleged action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (internal citations omitted).

Under either analysis, the denial of the Appellants' asylum applications constitutes a final agency action. First, the practical effect of this decision leaves the Appellants in limbo state, unable to proceed with their meritorious asylum claim, but protected from deportation by TPS. Legally, the Appellants would gain additional rights as asylees not available to them under TPS. This includes a path to Legal Permanent Resident status, the ability to travel and to have derivative familial beneficiaries. *See generally* *8 U.S.C. § 1158*, *1254a*. This ruling is definitive as the Appellants' only method to appeal the denial of their asylum claims is to lose lawful status and be put in removal proceedings. The Appellants should not have to violate immigration law to obtain review of their applications. For the same reason, the Appellants have no administrative solution. Next, a review of the Appellant's applications would not be unnecessary as the merits of their asylum claims were never reached by any reviewing body. Finally, the adjudication of these asylum

applications on the merits is the most effective way to enforce the INA. In doing so, the Appellants can stay in lawful status and continuing being contributing members of society. If the Appellants must be in removal proceedings for their application to be evaluated, then they must fall out of lawful status, thus violating the INA. Therefore, upon evaluating each of the factors established by this and the Supreme Court, the denial of the Appellants' asylum applications constitutes a final agency action.

3. Subject-Matter Jurisdiction

The Appellants' asylum applications were improperly denied, so they now seek review in the only available avenue. With the Defendants holding sole jurisdiction over applications for affirmative asylum for non-citizens not in removal proceedings, the Appellants have exhausted all administrative remedies by filing their applications and receiving a denial from the Defendants. Neither appellant was ever placed in removal proceedings, nor could they have been. Because the Executive Office of Immigration Review (EOIR) has no inherent de novo review, all remedies have been exhausted, and this Court is the proper venue for this suit.

The APA allows for judicial review of "a final agency action for which there is no other adequate remedy." As discussed, *supra*, the denial of the Appellants' asylum applications is indeed a final agency action. Furthermore, in the Notice of Denial, the defendant specifically stated, "[t]here is no appeal from this decision"

and that due to her valid TPS status, the Plaintiff's "asylum application will not be referred to an immigration judge for adjudication in removal proceedings." (Kewayfati ROA 205) (Maari ROA 79-80)

Additionally, in the Defendants Affirmative Asylum Procedures Manual, available for review on the USCIS website, it is clear that "the USCIS Asylum Division has jurisdiction to adjudicate the asylum application filed by an alien, . . . unless and until a charging document has been served on the applicant and filed with EIOR, placing the applicant under the jurisdiction of Immigration Court." (*See U.S. Citizenship and Immigration Services, Affirmative Asylum Procedures Manual (2016)* (emphasis added). The manual's language does not make it definite that a charging document will ever be served to an applicant and place them in removal proceedings. Instead, it shows that charging an applicant with removability is only one possible option that can possibly occur. The Procedures Manual later speaks on the reformed process for applications, in which "an applicant [that is found to be ineligible for an approval of asylum] who is in status receives a *Final Denial* letter without an accompanying Notice To Appear ("NTA") in removal proceedings at the time the final decision is rendered." *Id. (emphasis added)*. The language used here designates the denial letter to be the final decision, or the final agency action in which there is no charging document accompanied by the denial letter. The District Court's finding that there is no final agency action following the agency denial,

completely contradicts the Defendants language in the policy manuals. (Kewayfati ROA 246-247) (Maari ROA 147-148) .

Neither appellant has the availability to appeal their decision as noticed by the denial letter, nor do they have any remedy in removal proceedings in front of EOIR because, as shown by the procedures manual, it is only if a charging document is served that they are to find jurisdiction and another avenue of relief with immigration court. An NTA may only be issued to individuals who are removable, and individuals in valid status who have not violated their lawful status are not removable.[2] The Appellants have therefore received a final decision for their asylum applications. Regardless of how long they may be eligible for TPS, the Asylum Procedures Manual does not offer any additional forms of relief for applicants who are in lawful status to pursue. Consequently, the only relief available is for judicial review by this Court. Therefore, the Defendant's denial of the asylum applications marked the "consummation" of the agency's decision-making process in these cases.

Here, the Appellants were given a final, unappealable decision for their asylum applications. Because the Appellants were not issued charging documents, nor placed in removal proceedings, they are not provided with any other avenue to further exhaust their remedies. The Defendants themselves stated that the Appellants

[2] Or inadmissible if they are applying for admission.

would have a chance to renew her asylum application "if and when" either is placed in removal proceedings, thus again confirming that this potential avenue for relief is not guaranteed to occur. Ultimately, the Appellants have no other recourse available other than with this court.

Without judicial review, the Appellants have no means to adjust their status or convert to a permanent legal status while under TPS. If Venezuela's designations were to be extended akin to El Salvador, which has held TPS for over twenty years, the Appellants could remain in limbo, without permanent status, for the duration of their natural lives.[3] The determination made upon the Appellant's application indicates that they have no right to review or appeal any other decisions on forms of relief while they are under TPS status. Despite the Defendant's contention, there is no indication by policymakers that this is the intention.

It is the Defendant's position that applicants for asylum who do not hold lawful status or who have violated their lawful status are placed in a more preferable position than applicants who are in status. Specifically, such applicants are permitted to seek de novo review of a denial. This is an odd interpretation as it would actually reward immigration law violators, as opposed to applicants who maintain status. The Appellants should be afforded the opportunity for review and should be

[3] 66 FR 14214-16 (Mar. 9, 2001) TPS for El Salvador was initially issued in 2001 and has been extended and redesignated for the last 24 years.

applauded for faithfully maintaining their lawful status in the United States since their arrival in in 2014.

To bolster their position, the District Court cited an extra circuit case, *Dhakal v. Sessions,* 895 F.3d at 534-35. (Kewayfati ROA 246-247) (Maari ROA 147-148) The citation of *Dhakal* is misguided as it was decided by another Circuit Court in 2018. Subsequent case law in the 5th Circuit and in the Supreme Court have recently defined the boundaries of Temporary Protected Status as being in lawful status versus merely a temporary status quo pause as *Dhakal* mentions. Both the Fifth Circuit decision and the Supreme Court define TPS as a *lawful status*, not an amorphous place holder. *Solorzano,* 987 F.3d at 395; *Sanchez v Mayorkas,* 593 U.S. 409, 412 (2021). The ruling of *Dahkal* is predicated on TPS being a place holder, akin to deferred action, and not status. Recent case law should lead to a reexamination of the *Dahkal* court's past rationale.

The District Court was also persuaded by the Defendants citation to *Elldakli v. Garland*, in which this circuit found that status-based adjustments by USCIS are not a final agency action because the aliens have the right to de novo review of those decisions in removal proceedings. *Elldakli v. Garland*, 64 F.4th 666, 670 (5th Cir. 2023). (Maari ROA 94) In *Elldakli* the Plaintiffs-Appellants sought District Court review of denials of their status-based adjustment outside of removal proceedings, claiming they were not placed in removal proceedings and de novo review in

immigration court was unavailable to them. *Id.* at 669. The decisions challenged included a discretionary decision (denial of the I-140 national interest waiver) and the denial of their residency applications (I-485 Applications to adjust status). *Id.* However, the reasoning in *Elldalki* should not be applied to this case as a status-based adjustment and discretionary decision are distinct from the asylum application at issue here. The important distinction in *Elldalki* is that a federal district court is statutorily barred from reviewing discretionary determinations by the defendants (USCIS) and from reviewing applications of adjustment of status pursuant to 8 U.S.C. §§ 1255, 1252(a)(2)(B)(i), as clarified in *Patel v. Garland,* 142 S. Ct. 1614 (2021). Because of this distinction, the remedy in *Elldakli* was clear as the immigration courts hold de novo review power over applications for adjustment of status. Conversely, the judicial review of asylum decisions, at issue here, is not precluded by statute.

Federal courts may review the application of legal standards for asylum to the settled, undisputed facts of the case. *Alexis v. Barr*, 960 F.3d 722, 730 (5th Cir. 2020). Consequently, the holding of *Elldakli* should not steer the Courts gaze from the current fact pattern of the Appellants: a non-citizen in affirmative asylum processing may not seek de novo review of her application for asylum before an immigration judge if she is in lawful status; therefore, she has no alternative but to seek judicial review. When considering the facts of the present case this Court should find the

circumstances in *Elldakli* altogether distinguishable from the instant matter. Therefore, this Court should overturn the District Court's decision to dismiss the Appellants' claims under *FRCP 12(b)(1)*. This Court holds subject matter jurisdiction over these claims, and they should proceed to adjudication on the merits.

B. The Appellants properly stated claims upon which relief can be granted.

We reference by incorporation the arguments above and based on the above stated arguments in referencing the District Courts dismissal under FRCP 12(b)(6) as the Court may grant the relief sought by the Appellants. [4]

CONCLUSION

For the forgoing reasons, this Court should overturn the District Court's dismissal of these claims and allows them to be heard on the merits.

Respectfully submitted,
/s/Javier Rivera
Javier Rivera, Esq.
Rivera and Shirhatti, PC
Attorney for the Plaintiff
Texas Bar No. 24070508
Houston, Texas 77054
rjriveralaw@gmail.com
(P)(832)991-1105

[4] Plaintiff Agam de Maari's claim was dismissed solely under FRCP 12(b)(1) for lack of subject matter jurisdiction however Plaintiff Kewayfati had her matter dismissed under 12(b)(6) for failure to state a claim for which relief can be granted

CERTIFICATE OF SERVICE

I certify that on June 16, 2025, the foregoing pleading was filed with the Court through the Court CM/ECF system on all parties and counsel registered with the Court CM/ECF.

/s/Javier Rivera
Javier Rivera
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,102 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Microsoft Word Version 2504 with a 14 point font named Times New Roman.

/s/Javier Rivera
Javier Rivera
Attorney for Plaintiff

Date: June 16, 2025