

Can Marriage Conquer “Consular Nonreviewability” for a Spouse’s Visa Denial?

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In essence, this is the question that the U.S. Supreme Court has agreed to answer by taking the case of [Kerry v. Din](#). In *Kerry*, Fauzia Din, a U.S. citizen, asks the Court to recognize marriage as a constitutionally protected interest of a U.S. citizen which can trigger limited judicial review of her spouse’s visa denial and require the government to identify the specific laws and facts that are grounds for denying the visa. A Supreme Court ruling favorable to Ms. Din would establish an exception, based on a spousal constitutional interest, to the general rule of consular nonreviewability. This is the principle that a decision by a Department of State (DOS) consular officer to grant or refuse a visa is not subject to review by the courts. Regardless of the outcome, a Supreme Court decision would resolve an apparent conflict between the decision in [Din v. Kerry](#) by the U.S. Court of Appeals for the Ninth Circuit and [the prior decisions of other federal appellate circuits](#) about whether a U.S. citizen’s marriage is a constitutionally protected interest implicated by a visa denial, an interest which only the Ninth Circuit has recognized to date. A Supreme Court ruling could also clarify the level of detail and specificity the government is required to disclose about a visa denial. In federal appellate cases before *Din v. Kerry*, the government apparently had given visa applicants more specific information explaining a visa denial, although it is not clear whether this level of detail was legally required.

An “unadmitted and nonresident alien” has no constitutional right to be admitted into the United States; therefore, challenges to consular nonreviewability have rarely been successful. However, there is case law supporting limited judicial review of a visa decision implicating the constitutional rights and interests of U.S. citizens in the visa issuance to and admission of an alien. Most significantly, in [Kleindienst v. Mandel](#), the U.S. Supreme Court established a narrow exception for cases where denial of a discretionary waiver of a statutory ground for inadmissibility (and the resulting visa denial) may infringe the constitutional rights of U.S. citizens. The Court held that in such cases it would exercise “a highly constrained review solely to determine whether the consular official acted on the basis of a *facially legitimate and bona fide reason* [emphasis added]” and, if the official so acted, the courts would “neither look behind the exercise of that discretion nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.” On the other hand, *Mandel* implies that if the reason given is not facially legitimate and bona fide, the courts could go behind the reason to determine whether it is accurate. In *Mandel*, the government had actually given the visa applicant the exact, factual reasons for denying his visa. The Court noted that, “What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.” Some later federal appellate decisions have extended *Mandel*’s holding to [visa refusals by consular officers](#) or to the [assertion of other constitutional rights by U.S. citizens](#).

Citing *Mandel* and its own prior decisions, as well as those of other federal appellate courts, the Ninth Circuit in [Din v. Kerry](#) extended the *Mandel* exception permitting review, despite the general doctrine of consular nonreviewability, to the case of the refusal of a visa to the spouse of a U.S. citizen. Fauzia Din, a U.S. citizen, sued various federal officials for refusing an immigrant visa to her spouse, an Afghan national. The consular officials had cited all statutory grounds for inadmissibility broadly as the reason for denying the visa without citing any specific factual basis. When the couple sought further explanation and clarification, DOS officials ultimately cited the terrorism grounds for inadmissibility generally, plus the statutory notice provisions permitting the DOS to not give more specific information to the visa applicant, as would be required for visa refusals for reasons other than criminal or national security/foreign policy grounds.

In her lawsuit, Ms. Din alleged that, in the absence of a facially legitimate and bona fide reason, the denial of her spouse's visa violated her constitutionally protected interest in her marriage and that the notice provisions were unconstitutional as applied to her, the U.S. citizen spouse of the visa applicant. She asserted that the only relevant fact, that her spouse had worked as a clerk for the Afghan government before, during, and after the Taliban occupation, was not a facially legitimate and bona fide reason for visa denial. The federal district court dismissed her complaints, in part, because of the doctrine of consular nonreviewability. Although the district court found that the visa denial implicated her constitutionally protected interest in her marriage and applied the *Mandel* standard, it found that the general citation to the terrorism grounds of inadmissibility was a facially legitimate reason for visa denial. It also found that Ms. Din failed to plead facts sufficient to sustain a claim that the denial was in bad faith, albeit this failure was partly due to the absence of a detailed explanation from the DOS. The court found that Ms. Din didn't have standing, that is, she was not eligible to sue for lack of notice, because the law requiring notice about the reason for visa denial applied only to her spouse, not to her.

The Ninth Circuit reversed and remanded the district court decision. It applied the *Mandel* standard as expanded [by its own prior decision](#), finding, among other things, that a U.S. citizen has a liberty interest in marriage that is protected by the constitutional right to due process, thus entitling a citizen to judicial review of a spouse's visa denial. It disagreed with the district court by finding that the mere citation of the terrorism inadmissibility statute was not a facially legitimate reason for the denial, noting that those grounds were very broad, included a number of subcategories, and were not sufficiently specific. The broad citation and the failure to assert any facts about the spouse's alleged terrorist activities did not enable the appellate court to determine whether the consular officer had "properly construed" the inadmissibility statute. The Ninth Circuit observed that there were few cases, therefore, little guidance, for interpreting and applying the "facially legitimate and bona fide" standard. However, it concluded that accepting the government's position that a broad statutory citation *per se* is facially legitimate would effectively nullify the exception to consular nonreviewability recognized in *Mandel*.

The court also found that Ms. Din was eligible to sue for lack of notice about the reason for her spouse's visa denial because, although the notice did not apply to her, a court decision requiring more detailed notice about the reasons for the denial could potentially redress the injury she suffered because of her spouse's visa denial. The court found that the notice exception for criminal and terrorism grounds of inadmissibility did not preclude notice to the courts via a private hearing before a judge without the presence of the visa applicant and citizen spouse. This interpretation of the notice statute would satisfy the statutory protection of national security interests while enabling a court to decide whether a consular officer had "properly construed" the terrorism provisions in the inadmissibility statute.

[The federal government asked the U.S. Supreme Court to review the case](#), arguing that the Ninth Circuit had erroneously applied the *Mandel* standard and therefore created a conflict with decisions of the Supreme Court and other federal appellate courts. The government asserted that the Ninth Circuit had erroneously found that Ms. Din had a liberty interest in her marriage, protected under the Due Process clause of the Constitution, which was infringed by her spouse's visa denial. It asserted that, therefore, the Ninth Circuit had recognized a citizen's right to live with an alien spouse in the U.S. In its decision, the Ninth Circuit had refuted this assertion as a mischaracterization of a liberty interest in freedom of choice in marital life. The government further asserted that the Ninth Circuit had erroneously applied the *Mandel* exception to consular visa decisions because it only applies to discretionary waivers. As noted above, however, other federal appellate courts have also applied the *Mandel* exception to visa denials. [In response](#), Ms. Din asserted that there was no reason for the Supreme Court to revisit the Ninth Circuit's limited judicial review because it was pursuant to and consistent with *Mandel* and prior decisions of other federal appellate courts. As the response notes, other federal appellate courts applying the *Mandel* standard knew relatively detailed statutory and factual reasons for the visa denials, compared with the information that the Ninth Circuit found insufficient in *Kerry*.