Local Collaboration Shapes National Policy: *Mellouli* v. *Lynch*

By Anna K. B. Finstrom

Moones Mellouli, a U.S. permanent resident and a green card holder originally from Tunisia, was deported as a result of his guilty plea to misdemeanor possession of drug paraphernalia—namely, a sock, which contained several pills of what was alleged (but never found or proved) to be Adderall. Mellouli's unusual plea, which he made in 2010, was the result of Kansas's broad definition of paraphernalia and his lawyer's good effort to minimize the possible immigration consequences of the charges against him. Nonetheless, based on the paraphernalia plea and after successfully completing probation (he was not required to serve jail time as a part of his criminal case), Mellouli was apprehended by immigration agents in 2012. He was ordered deported by an immigration judge, whose decision was affirmed by the Board of Immigration Appeals.

Mellouli was deported while his case was pending on appeal to the Eighth Circuit. He had been working as an actuary and a mathematics instructor at the University of Missouri, and he was engaged to marry a U.S. citizen. His deportation, notably at a moment when North Africa and the Middle East were in great turmoil, meant his life in the United States was essentially over. He was to be banned for life. The Eighth Circuit denied his petition for review, affirming the government's decision to deport him. In his own words, "The day I got deported, I was devastated and overwhelmed. I have cried from sadness and bitterness about that day."

Last year, a team of Twin Cities lawyers (which included experts from private practice, the nonprofit community, and academia) helped to take Mellouli's case to the U.S. Supreme Court—and won. The Supreme Court held his deportation was unlawful. The prior decisions against him were reversed, and the precedential agency decision relied upon by the government in deporting him (which, coincidentally, originated at our local immigration court in Bloomington) was overturned.[1]

Mellouli v. *Lynch*[2] is an important victory not only because of what was gained for Mellouli but also because of what was preserved for immigrants and their advocates nationwide. *Mellouli* safeguards three tools critical to the immigration lawyer or criminal defender with a noncitizen client: the categorical approach, which prevents immigration courts from re-adjudicating criminal matters; effective plea bargaining; and *Padilla*,[3] which established the right to know and consider immigration consequences in criminal proceedings. Finally, *Mellouli* restores some proportionality to the immigration consequences resulting from minor drug convictions.

Overreaching Enforcement

Mellouli was apprehended and deported during one of the most aggressive immigration enforcement eras in recent times. Despite immigrant-friendly rhetoric, President Barack Obama has developed a harsh reputation as "deporter-in-chief."[4] Under Obama, over two million deportations have been carried out, which is probably more than any other presidential administration in history.[5] The Department of Homeland Security publicized 462,463 deportations in 2015 alone.[6]

The Obama administration's stated objective has been to strategically prioritize immigration enforcement resources, deporting "felons, not families;" "criminals, not children;" and "gang members, not a mom who's working hard to provide for her kids."[7] While comprehensive immigration reform has stalled for years in Congress, the president has undoubtedly struggled to strike a balance between building political credibility with immigration opponents by demonstrating enforcement capacity and addressing the humanitarian pleas of immigrant advocates. Obama's 2012 announcement of a formalized deferred-action program for "Dreamers" (undocumented immigrants under age 30 who arrived as children, have no significant criminal record, and have either completed high school or are currently in school) has provided temporary deportation protection and work permits to over half a million approved applicants.[8] A program offering similar protections to other undocumented immigrants, including the parents of Dreamers, has been tied up in federal courts since late 2014.[9]

Moones Mellouli no doubt suffered the consequences of the administration's push to demonstrate enforcement capacity. The government took a hardline position, imposing a bitterly disproportionate punishment on someone who had spent years navigating the long road to citizenship. Although the government's position was ultimately untenable, the political motivation to defend it was strong.

The Supreme Court

Having lost at the local immigration court, the federal Board of Immigration Appeals, and the Eighth Circuit—and having been

The Mellouli team at the U.S. Supreme Court. Photo credit Jay Malin. Courtesy of the University of MInnesota Law School

actually deported by the Department of Homeland Security—Mellouli had only one hope for returning to the United States: to challenge the devastating precedent at the nation's highest court. Fortunately, his Supreme Court team was fit for the task. At its core was a collaboration of Twin Cities attorneys, which included clinical faculty and student attorneys (of which I was one) from the University of Minnesota's Center for New Americans, the Immigrant Law Center of Minnesota, and a pro bono team at Faegre Baker Daniels.[10] These entities, together with Mellouli's original immigration counsel, Michael Sharma-Crawford of Missouri, litigated the merits of the case.

The case hinged on the interpretation of the statute under which Mellouli was deported. It reads in relevant part, "Any alien who... has been convicted of a violation of...any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)...is deportable." 8 U.S.C. § 1227(a)(2)(B)(i).

Mellouli's Supreme Court team asserted that the plain language requires, in order to trigger deportation under this statute, the crime of conviction itself (either its elements or the underlying record of conviction)[11] and must involve a drug controlled by the federal government under 21 U.S.C. § 802. *Mellouli* argued other convictions—involving, for example, a drug controlled only by a state (such as jimson weed, salvia, or one of several others controlled by Kansas), or a substance criminalized in a foreign country (such as poppy seeds, controlled by Jordan), or paraphernalia associated with an unidentified drug (as in Mellouli's case)—should not lead to deportation under this statute.

The team's research showed the fact that his conviction could be tied to any substance controlled by Kansas (versus a particular substance) was a circumstance typically limited to paraphernalia crimes and other low-level drug offenses. A 50-state survey of statutes and model jury instructions showed most convictions for more serious drug crimes involving possession, distribution, and manufacture of controlled substances would require a record identifying a particular substance—and therefore could still lead to deportation under Mellouli's reading of the statute.[12] Mellouli argued the different treatment of paraphernalia offenses on the whole—actually, in 19 states and under the federal law, possession of paraphernalia is not a crime at all[13]—reflects states' belief that such offenses are less serious, and therefore the failure of a paraphernalia conviction to trigger deportation under his reading is also appropriate as a policy matter.

The government urged that federal courts should defer to the interpretation of the immigration agency, as the Eighth Circuit did. The Eighth Circuit had affirmed Mellouli's deportation, reasoning any conviction associated with "the drug trade in general" was a deportable offense—even where, as in Mellouli's case, the conduct outlawed in Kansas (i.e., possession of paraphernalia) was not necessarily tied to the list of substances specified in the federal law. Mellouli countered this reading of the statute rendered the parenthetical phrase "as defined in section 802 of title 21" superfluous, and therefore was untrue to the text.

Mellouli's case was bolstered by national advocates who handled various angles as amici curiae. A group of over 90 law professors articulated how the government's approach jeopardized the longstanding rule preventing immigration courts from re-trying closed criminal matters. A collaboration of the National Association of Criminal Defense Lawyers, the Immigrant Defense Project, and the National Lawyers Guild argued deportation of a permanent resident is an unfitting consequence for a low-level crime such as possession of paraphernalia (conduct not criminalized under federal law), and substantially interfered with plea negotiations necessary to the basic functioning of the criminal justice system.

A joint effort of the National Immigrant Justice Center and the American Immigration Lawyers Association illustrated how the government's proposed interpretation of the statute would substantially complicate the task of litigating deportation cases, affecting both overburdened immigration courts and often unrepresented respondents. The depth of expertise and the breadth of support for Mellouli's case undoubtedly helped to bring the right result into focus.

In a powerful 7-2 decision, the Supreme Court held the government's "sweeping interpretation departs so sharply from the statute's text and history that it cannot be considered a permissible reading."[14] Furthermore, the Court concluded the government's approach led to anomalous results, was impracticable, and did not merit deference from federal courts.[15] The decision began the process of undoing Mellouli's deportation.

Mellouli recently recounted the day he received an email informing him he won at the U.S. Supreme Court. He said, "I cried that day, too. It was tears of joy."

Changing Precedent

It is an uphill battle for noncitizens who become involved with the criminal justice system, so those advocacy tools which do exist are indispensable. As impact litigation, *Mellouli* was a fight to preserve the effectiveness of the tools immigration lawyers and criminal defenders with noncitizen clients depend on every day. And it was a great success.

First, *Mellouli* robustly upheld a longstanding rule in immigration law known as the categorical approach. Immigration law routinely requires that state criminal laws are tested for compatibility with federal statutes in order to determine whether a certain offense is one that leads to deportability. The categorical approach is the principle that deportability is tested not by actual conduct but by a conviction, "presum[ing] that the conviction rested upon nothing more than the least of the acts criminalized."[16] The Supreme Court has said in analyzing the impact of a state-law offense for immigration purposes, the conviction is the "statutory hook."[17] The categorical approach ensures the constitutional guarantees of the criminal justice system are not bypassed in a re-trial by an immigration court, which does not provide the same procedural protections (for example, the rules of evidence do not apply nor is there a right to counsel in immigration court). It also ensures that allegations a defendant never had reason or opportunity to challenge are not later used against him for immigration purposes.

Second, *Mellouli* respected the importance of plea bargaining, particularly for noncitizen defendants seeking to mitigate immigration consequences along with criminal ones. The Supreme Court has "made clear that the negotiation of a plea bargain is a critical phase of litigation," and for that reason has specifically interpreted the Sixth Amendment to include a right to effective assistance of counsel in plea bargaining.[18] Plea bargaining becomes extremely high-risk if those consequences are unpredictable and drastically disproportionate to the conviction. As in Mellouli's case, the immigration consequence was unforeseen and far more severe than the criminal consequences of his plea (i.e., a fine and probation—no jail time).

Third, *Mellouli* defended the result of *Padilla v. Kentucky*, which held noncitizen defendants have a right to competent advice about the immigration consequences of a criminal

charge. In the words of the *Padilla* court, "The severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation."[19] *Padilla* was a game-changer for litigants and lawyers, both in criminal matters and in the immigration proceedings that follow, but it is only meaningful to the extent immigration laws are enforced in a way that is predictable, is faithful to statutory text, and honors constitutional rights.

Kathy Moccio, who provides in-house immigration expertise for the Hennepin County public defenders, addressed the real-life local impact of the *Mellouli* decision:

> We often see clients who fled extreme violence in their home country—maybe they have received death threats or witnessed the murder of a family member. Sometimes, they have self-medicated to address flashbacks, nightmares, and depression. Prior to *Mellouli*, such clients faced the cruel reality of banishment to the country they fled. Now, they may have opportunities to obtain treatment and preserve their home and family. It's a humane result that's good for the individual and it's good for the community.

Mellouli was also a course correction for beyond-the-pale aggressive immigration enforcement. The result reigned in what was an undue consequence—"the equivalent of banishment or exile"—for a minor offense by a U.S. permanent resident. As Moccio observed:

> At a time when the U.S. is recognizing that the criminal punishment meted out to drug users is unjustly harsh, *Mellouli* provides some sense of proportionality to the consequences a noncitizen faces.

While the executive branch struggles with the overwhelming challenges posed by our broken immigration system, impact litigation like *Mellouli* helps mitigate the consequences for those who are presently in the midst of it.

And the work goes on. Sheila Stuhlman of the Immigrant Law Center of Minnesota, which runs the Public Defender Project to provide immigration expertise to public defenders throughout the state, put it this way:

> The *Mellouli* decision, along with a few other recent immigration-related U.S. Supreme Court cases, has opened up a number of arguments that immigration practitioners can use in immigration court to argue that our clients are not actually deportable despite having a conviction for drug possession or possession of drug paraphernalia. But given the complexity of immigration law and the recency of the decision, close consultation with immigration practitioners is still required when noncitizen defendants are at the stage of contemplating a plea to a drug or paraphernalia offense.

The Aftermath

The aftermath of Mellouli's Supreme Court victory was not without obstacles. On remand, the Eighth Circuit and the Department of Homeland Security searched for wiggle room in the decision, looking beyond the elements of the crime of conviction and attempting to use allegations from a dismissed complaint in Mellouli's criminal record as a deportability hook.[20] Mellouli's team asserted the attempted workaround was again counter to the basic principles of the categorical approach. The Solicitor General's office ultimately agreed and laid out Mellouli's impact on how immigration officials must treat drug crimes for all noncitizens through a settlement agreement in October 2015.[21]

In March 2016, about 10 months after the Supreme Court decision, Moones Mellouli returned to the United States. He reflected on his experience at the airport just before boarding the plane to return home:

Mellouli's "Legal Permanent Resident" stamp in his passport.

> The lead immigration officer brought me my passport and gave me back my green card. She told me "all is good now" and apologized for making me wait so long.
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> I put my green card in my wallet and kept my passport with my boarding pass in my hand. I left the terminal and headed to the escalator towards my gate. While on the escalator, I opened my passport and I saw the stamp with "LPR" [lawful permanent resident] on it.
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> At that moment, I smiled and I told myself: everything comes to an end; all the suffering comes to an end and great things will happen to good people. I thanked God, took a picture of the stamp, and sent it to my mom, my fiancée, my brother, and my lawyers. Then I got on the plane.

[1] Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (BIA 2009).
[2] 135 S. Ct. 1980 (2015).
[3] 130 S. Ct. 1473 (2010).
[4] The Economist. *Barack Obama, deporter-in-chief.* http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama
[5] Hager, Nikki. *The Obama Administration and Immigration Policy: The Immigration Enforcement Record in Recent Years.* http://www.truth-out.org/news/item/28939-the-obama-administration-and-immigration-policy-the-immigration-enforcement-record-in-recent-years?tmpl=component&print=1
[6] U.S. Immigration and Customs Enforcement. DHS releases end of fiscal year 2015 statistics. https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics
[7] Obama, Barack. *Remarks by the President in Address to the Nation on Immigration,* Nov. 20, 2014. https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration
[8] American Immigration Council. *Two Years and Counting: Assessing the Growing Power of DACA.* http://www.immigrationpolicy.org/special-reports/two-years-and-counting-assessing-growing-power-daca
[9] United States v. Texas, 136 S. Ct. 906 (2016); Texas v. United States, 809 F.3d 134 (5th Cir. 2015); Texas v. United States, 787 F.3d 733 (5th Cir. 2015).
[10] The merits team also included attorneys from Faegre's Indianapolis office.
[11] A record of conviction includes nothing more than a charging document, a plea agreement, a plea colloquy, and/or jury instructions. *Mellouli* was decided under the "categorical approach" (looking only to the elements of a crime); the Court did not address Mellouli's argument under the "modified categorical approach," which sometimes allows a court to look to the underlying record of conviction. University of Minnesota Law School Center for New Americans, Practice Advisory for Criminal Defense and Immigration Attorneys, April 1, 2016: *The Impact of Mellouli v. Lynch on Minnesota Controlled Substance Offense.* http://www1.law.umn.edu/uploads/e6/06/e606aa2fe3350118a50140d904b794ca/Mellouli-Practice-Advisory-Final.pdf
[12] *See* Mellouli's reply brief at '17–18 & appendix.
[13] *See* Mellouli's opening brief at '39 & n.4.
[14] *Mellouli*, 135 S. Ct. at 1990.
[15] *Id.* at 1986–87, 1989.
[16] Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).
[17] *Id.* at 1685.
[18] Missouri v. Frye, 132 S. Ct. 1399, 1406 (2012) (quotation omitted).
[19] 130 S. Ct. at 1486.
[20] *Mellouli v. Lynch*, No. 12-3093, 2015 WL 4079087 (8th Cir. July 6, 2015).
[21] University of Minnesota Law School Center for New Americans. *Practice Advisory*, supra note 11.

Anna K. B. Finstrom

finstrom.anna@gmail.com

Ms. Finstrom was a member of the Mellouli Supreme Court team as a student attorney with the University of Minnesota's Federal Immigration Litigation Clinic. She will being joining Rinke Noonan in St. Cloud as an associate this fall.