Notes

Who Pays Detention Costs When Aliens Seek Asylum at the Borders of the U.S.? Relief May Be in Sight for the Transportation Industry

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I. INTRODUCTION

The United States is bound by international agreements as well as domestic statutes, to afford certain protections to aliens who reach her borders and then request asylum. The United Nations Protocol Relating to the Status of Refugees,[1] signed by the United States in 1967, prohibits the deportation of a refugee to the "frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion."[2] The Refugee Act,[3] passed in 1980, mandates that any passenger who arrives at the borders of the United States has the right to request political asylum, and the right to have this request fully considered.[4] Aliens who apply for asylum cannot be deported until their applications have been processed and denied.[5]

While the right to such consideration is fully accepted, the question of costs associated with the process is yet to be definitively settled. *Air Transport Ass'n of America v. McNary*,[6] pending in District Court in Washington, D.C., focuses on the financial responsibility of the carriers who brought the aliens to the borders of the United States.[7] The Air Transport Association of America claims that costs associated with the detention of aliens seeking asylum at the borders of the United States should be covered by funds generated under the Immigration User Fee Statute (User Fee Statute) of the Immigration and Nationality Act (INA).[8] The government disagrees with this position, claiming that the relevant statutes of the INA, as well as contract application, absolve the Immigration and Naturalization Service (INS) of this responsibility.[9]

Air Transport, filed January 22, 1992, was only the first of several suits to raise the issue of carrier liability in light of the User Fee Statute. *Dia Navigation Co. v. Reno*,[10] *Aerolineas Argentinas v. United States*,[11] *Argenbright Security v. Ceskoslovenske*,[12] *Dia Navigation Co. v. Pomeroy*,[13] and *Linea Area Nacional de Chile v. Sale*,[14] have also addressed

1. 19 U.S.T. 6223, 606 U.N.T.S. 267.
2. *Id.*
3. 8 U.S.C. §1158 (1987).
4. *Id.*
5. 8 U.S.C. §1105a(a) (1987 & Supp. 1994).
6. Air Transp. Ass'n of America v. McNary, No. 92-0181 (D.D.C. 1992).
7. Constance O'Keefe, *Immigration Fines and the Airlines Industry*, 59 J. AIR L. & COM. 357.
8. *Id.*
9. *Id.*
10. Dia Navigation Co. v. Reno, 831 F. Supp. 360 (D.N.J. 1993).
11. Aerolineas Argentinas v. United States, 31 Cl. Ct. 25 (1994).
12. Argenebright Sec. v. Ceskoslovenske Aeroline, 849 F. Supp. 276 (S.D.N.Y. 1994).
13. Dia Navigation Company, Ltd. v. Pomeroy, 34 F.3d 1255 (3d Cir. 1994).

this issue. It appears the critical distinction has become whether the alien seeking asylum is considered automatically excluded in which case the carrier retains responsibility, or is merely excludable, which confers responsibility on the INS. Although *Air Transport* is still pending, the other recent decisions offer an indication of the possible outcome of this important debate.

II. Historical Background and Statutory Basis

Courts have recognized the plenary power of Congress to set immigration policy since *Chae Chan Ping v. United States*[15] was decided in 1889. Requirements for admission to the United States have been determined, and classifications of individuals who will be denied entry have also been established. Aliens refused entry at the border must be returned to their country of origin as quickly as possible. The carrier transporting an inadmissible alien has traditionally been required to ensure that the return trip occurs, and to pay any associated costs.

Current statutes support this policy to some extent. Section 1227 of Title 8[16] deals specifically with the maintenance expenses involved in the deportation of any alien denied admission, placing all costs on the owner of the vessel or aircraft in which the alien arrived.[17]

Similarly, subsection (a) of 8 C.F.R. 235.3,[18] which addresses detention and deferred inspection, specifies that when admissibility of an alien is questioned, the carrier will be notified and is expected to assume responsibility for detention, and, if necessary, for transportation expenses to the alien's last foreign port of embarkation.[19] Subsection (d) specifies that the INS will not assume custody of an alien presented as a transit without visa passenger (e.g., a passenger scheduled to merely pass through the United States, and therefore travelling without a visa to the United States.)[20]

Section 1323 of the Code[21] also assesses a $3,000 fine on carriers who bring aliens (other than transit without visa passengers) lacking proper documentation to the United States.[22]

Prior to 1986, 8 U.S.C. §1223 provided that carriers bear financial responsibility for detaining those aliens temporarily removed for exami-

14. Linea Area Nacional de Chile v. Sale, 865 F. Supp. 971 (E.D.N.Y. 1994).
15. 130 U.S. 581 (1889).
16. 8 U.S.C §1227 (1987 & Supp. 1994).
17. *Id.*
18. 8 C.F.R. 235.3(a) (1994).
19. *Id.*
20. 8 C.F.R. 235.3(d) (1994).
21. 8 U.S.C 1323 (1994).
22. *Id.*

nation and inspection. However, Congress repealed this statute when it passed The Department of Justice Appropriation Act of 1986,[23] which established the "User Fee Statute."

The User Fee Statute imposes a $6 fee (raised from $5 by a 1993 amendment)[24] to be collected by airlines or other transportation providers, and then remitted to the government[25] "for the immigration inspection of each passenger arriving at a port of entry in the United States, or for preinspection of a passenger in a place outside of the United States prior to such arrival, aboard a commercial aircraft or commercial vessel."[26] These fees, along with civil fines imposed on transportation companies who bring excludable aliens into the United States, are kept in a separate account within the general fund of the U.S. Treasury.[27] Funds are to be used to reimburse the Attorney General for costs incurred in connection with the inspection and preinspection of aliens, and for costs associated with their detention and deportation.[28]

However, the enactment of the User Fee Statute did not result in the repeal of 8 U.S.C. §1227 (a),[29] which provides, in part, that the cost of maintaining an "excluded" alien prior to his or her departure remains the responsibility of the carrier in which the alien arrived.[30]

Traditionally, courts have deferred to agency expertise and upheld fairly strict application of the Immigration and Nationality Act statutes. For example, fines imposed as an administrative penalty on carriers who failed to detain or deport stowaways were upheld in a string of cases, in spite of arguments that shipowners had taken all possible precautions, and had reported stowaways at the earliest opportunity.[31]

Likewise, carrier responsibility for detention expenses has been upheld. In *United States v. Aero-Mexico*,[32] the airline was found to have the responsibility of providing adequate security for an alien awaiting an exclusion hearing (the alien escaped and was never recaptured). In *Public Health Trust v. United Safeguard Security Agency*,[33] the court ordered the carrier and its agent to pay $46,518 in medical expenses for a stowaway

23. 8 U.S.C. §1356 (1987 & Supp. 1994).
24. 8 U.S.C. §1356(d) (1994).
25. 8 U.S.C. §1356(f) (1994).
26. 8 U.S.C. §1356(d) (1994).
27. 8 U.S.C. 1356(h)(1)(B) (1994).
28. 8 U.S.C. §1356(h)(2)(A)(i)-(v) (1994).
29. 8 U.S.C. §1227(a) (1987).
30. *Id.*
31. Robert M. Jarvis, *Rusting in Drydock: Stowaways, Shipowners and the Administrative Penalty Provisions of INA Section 273(d)*, 13 TUL. MAR. L.J. 25.
32. United States v. Aero-Mexico, 650 F.2d 1062 (9th Cir. 1981).
33. Public Health Trust v. United Safeguard Sec. Agency, 577 So. 2d 994 (Fla. Dist. Ct. App. 1991).

(the alien was injured while attempting to escape from a seventh floor hotel room where he was being detained).

The issue of asylum, arising with increasing frequency, adds another expensive dimension to the question of detention costs. The hearing process for an asylum detainee can take months or longer. In its suit, Dia cited a General Accounting Office report indicating that from 1986 to 1989 the average amount of time required to process an asylum application ranged from 5.8 months in San Francisco, to 31.2 months in Chicago.[34] Expenses, which often include not only housing and food, but also security, medical needs, interpreters and other services, can be enormous. The stakes in the outcome of this debate are obviously high.

III. Recent Litigation

The concerns of the aviation industry over rising detention expenses are clearly expressed in *Air Transport Ass'n of America v. McNary*.[35] The Air Transport Association (totaling 19 passenger and cargo lines) brought suit against the Immigration and Naturalization Service in January, 1992, seeking a declaratory judgment shifting liability for the detention of aliens seeking asylum from the airlines to the INS. Interpretation of the User Fee Statute was the primary issue.[36]

Other recent decisions, however, provide some clarification of the issue and predictions on how the District court in *Air Transport Ass'n of America v. McNary* may hold.

A. *Dia Navigation Co. v. Reno*[37]

Dia filed a declaratory judgement action in March, 1993, seeking to have an INS policy requiring ocean carriers to detain stowaways who have applied for asylum, and also to pay their detention costs, declared unlawful and void.[38] The company also sought reimbursement for $127,580 it incurred for 54 days of detention of four stowaways who sought asylum. Dia Navigation's primary argument was that the User Fee Statute requires the INS to pay for such costs.[39]

In August, 1993, the court denied Dia's motion in all respects, and granted the government's motion for summary judgment.[40] On appeal,[41] the Third Circuit reversed the dismissal of the complaint, and remanded

34. Dia Navigation Co. v Pomeroy, 34 F.3d 1255, 1257 (3d Cir. 1994).
35. O'Keefe, *supra* note 7.
36. *Id.*
37. Dia Navigation Co. v. Reno, 831 F. Supp. 360 (D.N.J. 1993).
38. *Id.* at 363.
39. *Id.*
40. *Id.* at 380.
41. Dia Navigation Co. v. Pomeroy, 34 F.3d 1255 (3d Cir. 1994).

the case to the District Court with an order to award a declaratory judgment to Dia on its claim that the INS policy was invalid for failure to comply with the notice and comment procedure of the Administrative Procedures Act (APA). The dismissal of the claims for monetary relief, however, was upheld.[42]

B. *AEROLINEAS ARGENTINAS V. UNITED STATES*[43]

Both Aerolineas Argentinas and Pakistan International Airlines (the Co-Plaintiff) sought to recover costs of detaining transit without visa (TWOV) aliens who sought political asylum in the United States. Aerolineas filed suit in January, 1992, Pakistan International Airlines (PIA) in July, 1992. Upon written order from the INS, both airlines had provided hotel rooms, food, security, and other services for various asylum applicants. Aerolineas had incurred $222,000 in expenses over a two-year period; PIA sought reimbursement for more than $452,445. The Defendant's motion to dismiss was granted in March, 1994.

In finding for the airlines court found that the airlines could not recover for payments made to third parties; that the User Fee Statute did not mandate payment to airlines; that a regulatory taking had not occurred; and that the transit contract was not amenable to suit in the Court of Federal Claims.[44]

C. *ARGENBRIGHT SECURITY V. CESKOSLOVENSKE AEROLINE*[45]

In September, 1992, Argenbright, the agency providing security for a detained stowaway pending his political asylum application, filed suit against Ceskoslovenske. The airline, in turn, filed a third party action against the INS.

In April, 1994, the court held that illegal stowaways are "excluded aliens" within the meaning of the INA, and thus carriers must bear financial responsibility when such aliens apply for political asylum.[46]

D. *LINEA AREA NACIONAL DE CHILE V. SALE*[47]

In June, 1993, Linea Area Nacional de Chile (Lan-Chile) filed suit seeking a declaration that INS policies holding the airline responsible for detention costs of TWOVs seeking asylum exceed the INS's statutory authority, and were in violation of the APA. The airline claimed that such

42. *Id.* at 1265-1267.
43. Aerolineas Argentinas v. United States, 31 Ct. Cl. 25 (1994).
44. *Id.*
45. Argenbright Sec. v. Ceskoslovenske Aeroline, 849 F. Supp. 276 (S.D.N.Y. 1994).
46. *Id.* at 280.
47. Linea Area Nacional de Chile v. Sale, 865 F. Supp. 971 (E.D.N.Y. 1991).

policies were arbitrary and capricious, and that the INS should reimburse Lan-Chile $620,678.78 for costs incurred in connection with the detention of aliens seeking asylum.[48] The Plaintiff's motion for summary judgment was granted on September 14, 1994, and reimbursement by the INS ordered.[49]

IV. ANALYSIS

The results in these cases are not as disparate as they might seem. Examined chronologically, it appears that courts have evolved to an approach that shows less than the traditional deference to INS interpretations of the INA, and that the transportation industry may ultimately prevail on the issue of financial responsibility, at least with regard to TWOV aliens.

Dia Navigation Co. v. Reno was a case of first impression.[50] The key "fact" the *Dia* court relied upon in its decision was that stowaways, by definition of the INA, are "excluded" from admission to the United States, rather than being merely "excludable."[51]

The Immigration and Nationality Act[52] lists as excludable aliens that lack proper documentation; suffer from a communicable disease; have committed certain crimes; may be a security threat; may become a public charge; or may be immigration violators or illegal entrants. An alien who falls into one of the six excludable categories is generally subject to an exclusionary hearing before a special inquiry officer.

Stowaways are expressly listed as "excludable" aliens.[53] However, they are further considered to be a disfavored category of alien, and, unlike other classes of excludable aliens, have no right to an exclusion hearing by a special inquiry officer, or to an appeal to the Attorney General.[54] Stowaways, consequently, are considered to be automatically excluded from admission, and subject to immediate deportation. Expenses incurred in the detention of an excluded alien must, therefore, be borne by the carrier.[55]

Although Dia argued that the User Fee Statute requires the INS to assume these costs, the court reasoned that because Congress neither repealed nor amended those statutes that assessed carrier liability for detention of stowaways, Congress demonstrated the intent to continue to

48. *Id.*
49. *Id* at 999.
50. Dia Navigation Co. v. Reno, 831 F. Supp. 360, (S.D.N.J. 1993).
51. *Id.* at 366-367.
52. 8 U.S.C. §1182(a) (1994).
53. 8 U.S.C. §1182(a)(6)(D) (1994).
54. 8 U.S.C. 1323(d) (1994).
55. 8 U.S.C. 1227(a)(1) (1987).

treat stowaways as immediately excluded aliens, and to maintain carrier responsibility for both the physical detention of stowaways and for the associated costs as well.[56] Summary judgment was granted to the Defendants.[57]

A similar result was reached seven months later in *Aerolineas Argentinas v. United States*,[58] where the United States Court of Federal Claims dismissed the claims made by the airlines for reimbursement of expenses associated with the detention of aliens seeking asylum. Like *Air Transport*, the focus here was on TWOV passengers. Both airlines had entered into a Form I-426 Immediate and Continuous Transit Agreement, which, the court noted, required the carrier, "without expense to the government of the United States, [to] remove to the foreign port from which the alien embarked . . . any alien . . . found by the proper officials not to be eligible for passage through the United States in immediate and continuous transit."[59]

The airlines conceded that the transit agreements contemplated payment of delay-on-return expenses, but contended that detention for asylum processing was not contemplated.[60] They noted that 8 U.S.C. §1356(h)(2)(A)(v) calls for the user fees to be used for detention and deportation services, relieving the transportation line of any responsibility for such services.[61]

The court, noting that it "must defer to an agency's reasonable interpretation of the statute it is charged with administering,"[62] did not address the User Fee Statute, but instead focused solely on the issue of jurisdiction. The airlines argued jurisdiction could be based on either illegal exaction[63] or the right to payments from the Treasury.[64] The court disagreed, finding that no money or property was taken directly from the airlines,[65] and that there was no entitlement to treasury funds found within the statutory language.[66]

Applying the three factors from *Atlas Corp. v. United States*,[67] the court also held that no regulatory taking occurred. Requiring the airlines

56. Dia Navigation Co. v Reno, 831 F. Supp. 360, 369.
57. *Id.* at 379.
58. Aerolineas Argentinas v. United States, 31 Ct. Cl. 25 (1994).
59. *Id.* at 28.
60. *Id.* at 29.
61. *Id.* at 29-30.
62. *Id.* at 30, n.6. (Citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984)).
63. *Id.* at 30.
64. *Id.* at 31.
65. *Id.* at 31.
66. *Id.* at 32.
67. Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990).

to pay for detention services did not invade or appropriate their property. "At most, it merely interferes with their property rights pursuant to a public program intended to promote the public good . . . ."[68] The court found that it was not clear that a "right" to bring TWOV passengers to the United States was a even a recognized "property right".[69]

Further, the Plaintiffs did not contend that they had been completely deprived of their economic right to conduct their business profitably, nor did they deny that detention costs could be minimized by more stringent precautions by airlines upon enplanement of such passengers.[70] The court rather unsympathetically noted the airlines had "made a business decision to risk incurring costs of such detention as the price of carrying passengers without visas."[71]

The arguments advanced under contract theory were equally unsuccessful for the airlines. Finding no basis for jurisdiction, the Court of Federal Claims therefore dismissed all claims by the airlines.[72]

Just a month later, the U.S. District Court in New York essentially reiterated the approach taken by the *Dia* court and dismissed the third party complaint filed against the INS in *Argenbright Security v. Ceskoslovenske Aeroline*.[73] Like *Dia*, this case focused on application of the INS user fee policy to stowaways.

The court affirmed that pursuant to the Refugee Act, courts have uniformly held that stowaways have a right to political asylum,[74] and that INS regulations provide that, pending adjudication of the claim, the INS may parole the stowaway into the custody of the carrier.[75]

While the court noted that the User Fee Statute shifted the financial responsibility for detention and deportation of excludable aliens to the INS,[76] under 8 U.S.C. §1227(a), "the cost of maintaining an 'excluded' alien prior to deportation, including detention expenses, remains upon the carrier responsible for transporting such alien into this country."[77]

Ceskoslovenske Aeroline (CSA) argued that the statutory language (providing that "[a]ny alien who is a stowaway is excludable)"[78] indicates that the INA treats stowaways merely as excludable rather than excluded, and that its claim for detention expenses was thus not barred by 8 U.S.C.

68. *Id.* at 34.
69. *Id.*
70. *Id.* at 34, n.12.
71. *Id.* at 35.
72. *Id.* at 36.
73. Argenbright Sec. v. Ceskoslovenske Aeroline, 849 F. Supp. 276 (S.D.N.Y. 1994).
74. *Id.* at 278.
75. *Id. See* 8 C.F.R. §253.1(f)(3) (1994).
76. *Id.* at 280.
77. *Id.*
78. 8 U.S.C. §1182(a)(1)-(6) (1994).

§1227(a).[79] The court disagreed with this interpretation, finding that, construing the INA in its entirety, stowaways are a "disfavored" category.[80] "Thus, despite the availability of an asylum hearing, stowaways remain 'excluded' aliens, and, as such, the expenses incident to their detention must be borne by carriers pursuant to section 1227(a)(1)."[81]

Like the *Dia* court, this court concluded that because section 1227(a)(1) and 1323(d) were unaffected by passage of the User Fee Statute, Congress had no intent to alter the treatment of stowaways.[82] The court also ruled that carrier liability is not limited to the $3,000 administrative penalty authorized by section 1323(d). The fine is a sanction, and has no bearing on the responsibility for costs.[83]

CSA also claimed that the INS policy constituted arbitrary and capricious agency action in violation of the Administrative Procedures Act, arguing that the policy was a legislative or substantive "rule" and should have been promulgated through the APA's notice and comment procedures.[84] This argument was unsuccessful. The court found that INS policy merely tracked the language of the INA, and was therefore interpretive in nature, not requiring the notice and comment procedure.[85]

However, the Third Circuit was less deferential to the INS when it considered *Dia* on appeal,[86] and reached the opposite conclusion. On September 13, 1994, the *Dia* decision was remanded, based on the determination that the INS policy was a "legislative rule" rather than an "interpretive rule," and therefore could only be promulgated pursuant to notice and comment procedures of the APA.[87] The court noted a fundamental tension in the statutory framework which requires immediate deportation of stowaways (a responsibility of the carrier), but seems to contemplate custody for only the short period between the issuance of the deportation orders and the deportation itself—not for the duration of the hearing process.[88] The court also noted that the "backdrop" for the present statutory scheme was a legislative history strongly evincing congressional desire to place responsibility for detention on the INS, and the repeal of §1223, which had placed the burden of paying for detention on

79. *Argenbright*, 849 F. Supp. at 279.

80. *Id* at 280; *see also* Yiu Sing Chun, 708 F.2d at 875 n.21 (2d. Cir. 1983) (referring to stowaways as highly disfavored class); Haitian Refugee Center v. Gracey, 809 F.2d 794, 839 n.129 (D.C. Cir. 1987) (citing Yiu Sing Chun).

81. *Argenbright*, 849 F. Supp. at 280.

82. *Id.* at 281.

83. *Id.* at 281.

84. *Id.* at 282.

85. *Id.*

86. Dia Navigation Co. v. Pomeroy, 34 F.3d 1255 (3d Cir. 1994).

87. *Id.* at 1267.

88. *Id.* at 1262.

carriers.[89]

The Court of Appeals did not find a clear answer to the question of responsibility for detention in either the statute or the rules, but did determine that because of statutory ambiguity, the INS had not conformed with the requirements of the APA in establishing its detention costs policy.[90] The court did find, however, that the monetary reimbursement Dia sought was properly categorized as money damages, and was therefore appropriately denied in the original suit under the doctrine of sovereign immunity. Further, denial of Dia's claim under the Tucker Act was also appropriate because the district court lacked subject matter jurisdiction.[91] So while the Third Circuit was willing to at least question the INS interpretation of the User Fee Statute, very little actually changed for carriers.

The situation improved dramatically for the transportation industry a day later when the United States District Court in New York decided *Linea Area Nacional de Chile v. Sale*.[92] Like Dia and Ceskoslovenske in previous cases, Lan-Chile argued that the INS policy regarding detention responsibility was in violation of the APA, and sought reimbursement for amounts paid, or to become due, in connection with the detention of aliens.[93] The result for Lan-Chile was more satisfactory.

This court focused primarily on two areas: the legislative history of the User Fee Statute, and the specific wording of the statutes and regulations authorizing the transit of TWOVs through the United States.

The court noted that legislative reports "unambiguously" demonstrate congressional intent to shift the financial and physical responsibility of "excludable" aliens to the INS, even if they do not specifically address the unique situation of either TWOVs, or stowaways who seek political asylum.[94]

The INS argument relied on certain regulations passed after the User Fee Statute which indicated the INS would not assume custody of aliens presented as TWOV passengers,[95] and that nothing contained in the User Fee Statute should be deemed to waive the carrier's liability for detention, transportation, and other expenses incurred in bringing aliens to the United States under the terms of the section.[96] However, the court stated that, read and construed in their entirety, the statutes and regulations "compel the conclusion" that the transportation line was intended to be

89. *Id.*
90. *Id.* at 1265.
91. *Id.* at 1267.
92. Linea Area Nacional de Chile v. Sale, 865 F. Supp. 971 (E.D.N.Y. 1994).
93. *Id.* at 975-976.
94. *Id.* at 982.
95. 8 C.F.R. Sec. 235.3(d) (1994).
96. 8 C.F.R. 238.3(c)(1994).

responsible for the custody of a TWOV only so long as necessary "to insure such immediate and continuous transit through, and departure from, the United States en route to a specifically designated foreign country."[97] The court reasoned that once an alien applies for political asylum, the conditions upon which the TWOV privilege was granted have been breached, and that the alien's status as a TWOV has then been forfeited, making him nothing more than an excludable alien.[98] "If the privilege granted to transportation lines is on condition that the alien will continue in transit and not apply for extension of temporary stay and the carrier accepts the privilege on that condition, imposing custodial responsibility upon the carrier when the alien breaches the condition is hardly defensible."[99]

Lan-Chile claimed that the INS policy regarding carrier responsibility exceeded statutory authority, and was in violation of the APA. The court agreed:

> Given the fact that the Act was designed to relieve carriers of the physical and financial responsibility of detaining aliens . . . it follows that an INS policy . . . which results in imposing on the carriers custodial responsibility for those excludable aliens, is in clear contravention of the plain meaning of the Act and is in violation of Congressional intent, and hence is unreasonable and in violation of the APA.[100]

The court further noted that it would be inequitable to hold the carriers physically and financially responsible for detaining those particular TWOV aliens because (1) it would be impossible to screen aliens before they board to determine which aliens plan to seek asylum; (2) there are no guidelines on how long a carrier must detain the alien before his application is processed; and (3) it is inconsistent with the statutory and regulatory basis which merely contemplates allowing TWOVs to transit through the country.[101]

The court concluded that the INS's interpretation of the User Fee Statute was "seriously flawed" because the INS continued to believe that it could hold private carriers responsible for jailing those aliens indefinitely, and pursuant to any conditions the agency deemed appropriate.[102] Although the legislative history of the User Fee Statute did not specifically discuss the issue of TWOVs who request political asylum, the possible negative ramifications of turning private corporations into jailers was

97. *Linea Area Nacional*, 865 F. Supp. at 983.
98. *Id.*
99. *Id.*
100. *Id.* at 986-987 (citing Osorio v. Immigration and Naturalization Serv., 18 F.3d 1017, 1031 (2d Cir. 1994)).
101. *Id.* at 987.
102. *Id.* at 988.

a concern noted by the House Appropriations Committee.[103] The court stated that the INS interpretation was "unreasonable, and hence not worthy of the traditional deference usually accorded agency interpretation."[104]

Lan-Chile also argued that by contract carriers are responsible for "passengers." The court agreed that aliens waiting months for asylum hearings are no longer passengers.[105] The forfeiture of that status terminates the carrier's custodial obligation. By imposing obligations extending beyond this passenger status, the court found that the INS exceeded the authority conferred on it by 8 U.S.C. §1228(c), in violation of the APA.[106]

In addition, Lan-Chile claimed that the INS's policy requiring carriers to assume the physical and financial burden of detention expenses was arbitrary and capricious, and in violation of 5 U.S.C. §706(2)(A). The court agreed, finding it unreasonable and illogical to compel private corporations to be the jailers of excludable aliens for unlimited amounts of time when there is a fund established by Congress for reimbursing the Attorney General for these same expenses.[107]

Perhaps most important, the court also agreed with Lan-Chile on the issue of reimbursement. While previous decisions had equated recovery of costs with money damages barred by the doctrine of sovereign immunity, the complaint here was viewed as one for equitable relief—a return of expenditures.[108] Although there is no statutory entitlement to funds in the case of stowaways, the User Fee Statute provides the entitlement in the case of TWOVs.[109] Accordingly, the court ordered the INS to reimburse Lan-Chile $620,678.78, plus interest.[110]

V. Conclusion

Undoubtedly, the *Lan-Chile* decision will be appealed. But in light of the apparently changing perspective of the courts, the decision may be upheld. The courts have shown signs of moving away from the deference that has traditionally been shown the INS.

Although the INS prevailed, at least monetarily, in most of the recent decisions, the courts also, with the exception of the Federal Claims Court, showed a willingness to examine the congressional intent behind

103. *Id.*
104. *Id.* at 988, n.24.
105. *Id.* at 992-993.
106. *Id.* at 993.
107. *Id.* at 994.
108. *Id.* at 996.
109. *Id.*
110. *Id.* at 999.

the passage of the User Fee Statute, and also to consider the equity of the results.

It seems clear that a distinction is to be made between responsibility for stowaways (who are excluded from entry to the United States), and from TWOVs (who are merely excludable).

In supporting the INS interpretation of the User Fee Statute on the basis of this distinction, as the *Dia* and *Argenbright* courts did, it appears that the door was opened for the *Linea* court to find that responsibility for TWOV "passengers" does indeed fall on the INS.

Such a result seems fair. As the *Linea* court noted:

> It is reasonable to place responsibility upon the carrier for a careful inspection of all the spaces of its vessel or aircraft to assure that those spaces are not occupied by persons who have not been cleared for boarding. It is not reasonable to place responsibility upon the carrier for the state of mind of a person properly cleared to occupy its spaces.[111]

This issue is far from settled. The stakes in the debate are high, and there is still the notable tendency among courts to treat federal agencies with deference. But if these recent decisions are an accurate indication, there is a good possibility that the Air Transport Association will prevail in its pending suit. Responsibility for the detention of TWOV aliens during the asylum process may be shifted to the INS, which the transportation industry has insisted was the intent of the User Fee Statute.

111. Linea Area Nacional de Chile, 865 F. Supp. at 995.