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What is the Law on the Doctrine of Consular Nonreviewability Following Kerry v Din?

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By Laurel Scott

In June of this year the Supreme Court ruled on Kerry v Din, 576 US ____ (2015). It was a much anticipated case as it was perceived as the case where the Doctrine of Consular Nonreviewability would be either upheld or struck down. In the end neither of those outcomes materialized. The Court had a three-way split in its opinions, with no one opinion signed by a majority of the Justices. This means the case created no new precedent case law.

Ms. Din is a US citizen petitioning for her Afghani husband who used to work as a low-level payroll clerk for the Afghani government while it was under the control of the Taliban. His immigrant visa was denied by the US consulate in Islamabad, Pakistan. The denial only listed the legal citation for the denial – INA §212(a)(3)(B) [aka US Code §1182(a)(3)(B)] – which is in regard to terrorist activities, but provided no factual analysis for why the finding was made. Ms. Din brought suit in federal court, arguing that if the US government was going to keep her apart from her husband for the rest of her life, she was entitled to a couple of sentences telling her why. Specifically, the questions for review that she (through her attorney) presented to the Supreme Court were:

> "1. Whether a consular officer's refusal of a visa to a U.S. citizen's alien spouse impinges upon a constitutionally protected interest of the citizen.
>
> 2. Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa."

One of the problems with using this case as the one to take to the Supreme Court to challenge the Doctrine of Consular Nonreviewability is that there is a section of law – INA §212(b)(3) [aka US Code §1183(b)(3)] – specifically excusing the US government from providing details for a denial where a foreign national is found inadmissible for criminal reasons (INA §212(a)(2)) or national security reasons (INA §212(a)(3)). INA §212(b) reads:

> "Notices of Denials.-
>
> (1) Subject to paragraphs (2) and (3) if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a), the officer shall provide the alien with a timely written notice that-
>
> (A) states the determination, and

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