

IN THE UNITED STATES ARMY
FOURTH JUDICIAL CIRCUIT

UNITED STATES)

v.)

SALEH, Gary W.)
SPC, U.S. Army)
S&T Troop)
Regimental Support Squadron)
11th Armored Cavalry Regiment)
Fort Irwin, CA 92310)

**GOVERNMENT'S
MOTION *IN LIMINE*
TO EXCLUDE DEFENSE
EVIDENCE UNDER
MRE 303, 401, 402 & 403**

DATED: 13 JUNE 2011

RELIEF SOUGHT

The Prosecution in the above case requests that the Court prohibit the Defense from introducing evidence or eliciting testimony on cross-examination concerning Ms. Houda Chaji's immigration status. Pending Defense response to this motion, and any theory of admissibility raised therein, the Prosecution may request oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The burdens of proof and persuasion lie with the defense as the anticipated proponent of the evidence. The burden of proof must be met by a preponderance of the evidence.

FACTS

1. Ms. Houda Chaji claims that the accused raped her at knife point on the night of 18 August 2010.
3. On 23 February 2011, during the Article 32 Investigation, the accused, through counsel, elicited testimony from Ms. Chaji regarding her immigration status.
3. Ms. Chaji testified that she was born in Morocco, immigrated to Canada, and entered the United States through the Canadian border.
4. Ms. Chaji currently resides at Fort Irwin, California as the dependent spouse of SPC Khalid Belkhatir.

WITNESSES/EVIDENCE

The Prosecution submits the following evidence in support of this motion: Article 32 Testimony of Ms. Houda Chaji.

LEGAL AUTHORITY AND ARGUMENT

This Court should exclude any evidence of Ms. Chaji's immigration status because it is irrelevant under MRE 401 and, therefore, inadmissible pursuant to MRE 402. Furthermore, because they are irrelevant, any questions directed to Ms. Chaji regarding her immigration status would be improper under MRE 303 because they would only tend to degrade her.

During the Article 32 Investigation, the accused elicited testimony from Ms. Chaji regarding her immigration status. The government anticipates the accused will likewise attempt to do so during their case-in-chief. A background check of Ms. Chaji failed to reveal the existence of any conviction arising from a violation of the Immigration and Nationality Act.

In order to be admissible, evidence must be both legally and logically relevant. *United States v. Dimberio*, 56 M.J. 20, 2001. Evidence pertaining to Ms. Chaji's immigration status does not appear to satisfy either of these requirements.

MRE 401 establishes the requirement that evidence be logically relevant; defining relevant evidence as having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This rule is given effect via MRE 402, which disallows any evidence falling outside of this definition.

It is the accused, SPC Saleh, who is being court-martialed; not Ms. Chaji. The consequential issue in this case is whether SPC Saleh raped Ms. Chaji at knife-point. Ms. Chaji's immigration status, in and of itself, has no impact on the veracity of her claims. Unless the accused can demonstrate some nexus between Ms. Chaji's status and her credibility as a witness, this evidence is not logically relevant and must be excluded pursuant to MRE 402.

Furthermore, even if the accused is able to articulate some theory which would make Ms. Chaji's status logically relevant, the defense must also show this evidence is legally relevant. In order to accomplish this, the Defense must fulfill the requirements of any additional rules (for example, MREs 404(a)(2), 608 or 609) triggered by their theory of logical relevance.

Additionally, immigration and immigration reform are very politically charged issues; and the Immigration and Nationality Act is a very complex statute. Because of this, there is a great risk that even if otherwise admissible under some other MRE, the evidence should nevertheless be excluded under MRE 403. Allowing the introduction of immigration evidence is likely to create a trial within a trial, as counsel for each side introduce all of the additional evidence necessary to establish, explain, and give context to Ms. Chaji's status. Unless the Defense is able to articulate a theory making Ms. Chaji's status very probative, there is a great danger that the introduction of this evidence would unnecessarily confuse the issues, mislead the members, and waste time.

To date, the accused has failed to articulate any theory of logical or legal relevance, whatsoever, and the Government believes they cannot. Because of this, the Government fears the Defense may attempt to introduce this evidence solely to distract the members, and degrade Ms. Chaji.

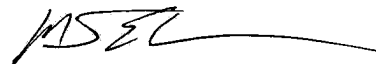
CONCLUSION

This Court should preemptively prohibit the accused from attempting to elicit any testimony or introduce any other evidence of Ms. Chaji's immigration status. There is no connection between it and any fact of consequence in this case. The evidence is irrelevant and degrading.



MATTHEW E. WRIGHT
CPT, JA
Trial Counsel

I certify that a copy of the foregoing *Motion in Limine to Exclude Defense Evidence Under MRE 303, 401, 402, & 403* was served upon CPT Laquisha Douglas and Mr. Haytham Faraj via email on 13 June 2011.



MATTHEW E. WRIGHT
CPT, JA
Trial Counsel

Houda Chaji, Fort Irwin, California, was recalled as a witness by the Defense, and reminded that she was still under oath, and testified in substance as follows:

QUESTIONS BY THE DEFENSE

[Portions of the transcript not relating to Ms. Chaji's immigration status have been omitted.]

I came into this country legally. I don't want to talk about my personal life.

The Investigating Officer tells the witness to answer the questions

Yes, I know it is a crime to come into this country illegally. I came from the Canadian border, and I am from Morocco. I drove to America from Canada, I met my husband and then I applied like normal people. I married my husband on 20 October 2002, I met him two days or a week before. It didn't know him before I came to America, I met him then we got married. I didn't marry him for citizenship. That's how we do it in my country Morocco. I don't have my passport yet, I have my lawyer preparing everything for me. I believe if the government knows I am here, I am legal. I have a visa for Canada. I swear to God, my lawyer never told me that I would be allowed to stay in this country and given amnesty, if I alleged I was a victim of a violent crime. I call my lawyer Mr. Kuk, he is in Georgia. Why do you have to talk about religion?