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A NATIONAL SURVEY OF CURRENT LEGAL DEVELOPMENTS

MARCH 22, 2011*Immigration—Judicial Review***Motion to Reopen Process Provides Aliens With Protections on Par With Habeas Review**

Where constitutional violations are alleged to have prevented an alien from filing a timely petition for review of a removal order, the statutory motion-to-reopen process provides an adequate substitute to habeas review, the U.S. Court of Appeals for the Second Circuit held March 3 (*Luna v. Holder*, 2d Cir., No. 07-3796-ag, 3/3/11).

The lack of such a viable alternative would raise serious constitutional concerns under the Suspension Clause of the U.S. Constitution, Judge Rosemary S. Pooler said, writing for the court.

However, by vesting the power of judicial review in the courts of appeals for both constitutional claims and questions of law raised as part of an alien's statutory motion to reopen, Congress gave the circuit courts the ability to reset the clock where necessary.

The court also held that the government can not manipulate the review process simply by removing an alien while his or her motion to reopen is pending. Congress gave the Board of Immigration Appeals jurisdiction over motions to reopen as long as they are filed within 90 days, the court said. The BIA can not carve up that jurisdictional grant by simply declaring motions brought by aliens already removed as "withdrawn," it concluded.

Beth Werlin, Deputy Director, Legal Action Center, American Immigration Council, Washington D.C., told BNA in a March 17 interview that continued jurisdiction over removed aliens was an issue the government has consistently fought against in recent years.

"The government probably sees this as a significant loss," she said.

30-Day Deadline Missed. Under 8 U.S.C. § 1252(b)(1), aliens facing an order of removal have 30 days to file a petition for review with a circuit court. In this case, the petitioners asserted that they missed that deadline due to constitutional violations—ineffective assistance of counsel in one case, and government interference in the other. Specifically, the petitioner alleging government interference claimed that his detention prevented him from accessing necessary legal documents.

Historically, such constitutional claims could be addressed by pursuing a writ of habeas corpus. However, Congress altered the system in 1996 by way of the Antiterrorism and Effective Death Penalty Act and the Ille-

gal Immigration Reform and Immigration Responsibility Act, which funneled the review of all final orders of removal through the courts of appeals.

'Adequate and Effective Substitute?' The question for the Second Circuit was whether the absence of habeas review was offset by the availability of a statutory motion to reopen, codified by Congress in IIRIRA.

Typically, an alien who misses the 30-day petition for review deadline may file a motion to reopen the proceedings with the BIA, 8 U.S.C. § 1229a(c)(7). If granted, the order of removal is reissued, giving the petitioner an additional 30 days to seek review from the circuit court.

If the motion to reopen is denied, the petitioner then has 30 days to petition the circuit court for review of that decision, but not the merits of the removal order.

In the end, the court concluded that statutory motions to reopen are an "adequate and effective substitute" for habeas review, but only after assuring itself that certain protections were built into the process.

Review of Motions Meaningful. The Suspension Clause, U.S. Const. art. I, § 9, cl. 2, prohibits the writ of habeas corpus from being suspended except in extraordinary circumstances. But, as the court pointed out, a different remedy may be substituted as long as it is equally protective of a person's right to challenge his or her detention at the hands of the government.

Here, the Second Circuit insisted, and the government conceded, that "BIA denials of statutory motions to reopen are subject to judicial review to the same extent provided by habeas review,"—that is, they are reviewed de novo. Thus, the BIA can not "style its reopening denials as discretionary," effectively preventing any meaningful review of those decisions, the court said.

Second, "[a]lthough an alien generally may file only one statutory motion to reopen, 8 U.S.C. § 1229a(c)(7)(A), and generally must do so within 90 days of a final order of removal, § 1229a(c)(7)(D)(I), neither requirement is jurisdictional." Therefore, the court pointed out, "[a]n alien who files a motion to reopen is entitled to equitable tolling when he exercises due diligence in filing the motion and shows that he was prevented by ineffective assistance of counsel or governmental interference from filing the motion on time."

Finally, "this Court must have the authority to order reissuance [of the order of removal] if the motion to reopen process is to be an adequate and effective substitute for habeas," the Second Circuit said.

"Indeed, we believe that Congress envisioned that we would grant such remedies in appropriate cases," it concluded.

Notably, the government originally agreed with the Second Circuit on this point, but later altered its position in a subsequent brief.

'Departure Bar Regulation' Shot Down. Additionally, the court said that for the motion to reopen process to be an adequate substitute for habeas review, it must not be "subject to manipulation" by the government.

Here, citing 8 C.F.R. § 1003.2(d), the government argued that it lacks jurisdiction over motions to reopen when the movant has already been removed from the United States.

The court disagreed, explaining that "the BIA may not contract the jurisdiction that Congress gave it by applying the departure bar regulation."

"Congress alone controls the BIA's jurisdiction to hear motions to reopen filed under 8 U.S.C. § 1229a(c)(7)," and the agency can not escape its responsibilities simply by creating its own rules, the court held.

Thus, "the BIA must consider an alien's motion to reopen even if the alien is no longer in the United States," it said. That means the government can not manipulate the motion to reopen process by removing an alien and treating the motion as withdrawn.

Judges Guido Calabresi and Denny Chin joined the opinion.

Simpler Process a 'Silver Lining.' "The post departure issue is very significant," Werlin told BNA. In the past immigrants who filed a motion to reopen were simply

deported and thus lost the opportunity to pursue their claims, she explained.

This decision comes following a number of opinions from other courts striking down the departure bar in one way or the other, Werlin said.

The government fought those cases "pretty aggressively," she said, suggesting that it probably was not pleased with the Second Circuit's ruling on the issue.

From a big picture perspective, the decision follows a trend over the past few years that has seen the motion to reopen gain strength as an effective "safeguard" for immigrants' rights, Werlin explained.

Additionally, as opposed to habeas review, a motion to reopen has the added benefit of being "easier to take advantage of" from a practical and procedural standpoint, Werlin pointed out. Given that much of the immigrant population is not represented by counsel and tend to appear pro se, the decision to rely on the motion to reopen process as opposed to habeas review could be a "silver lining" in that respect, she said.

Both petitioners appeared pro se. Jennifer Chang Newell, Lee Gelernt, and Tanaz Moghadam represented the American Civil Liberties Union as amicus curiae. Carol Federighi, Jennifer R. Khouri, and Brenden P. Hogan, Department of Justice, represented the government.

Full text at <http://pub.bna.com/lw/073796.pdf>.