1-1-2009

Did Congress Strip the Federal Circuit Courts of the Power to Review Denials of Motions to Reopen Immigration Proceedings?

Jessica E. Slavin
Marquette University Law School, jessica.slavin@marquette.edu

Publication Information
Jessica E. Slavin, Did Congress Strip the Federal Circuit Courts of the Power to Review Denials of Motions to Reopen Immigration Proceedings?, 37 Preview U.S. Sup. Ct. Cas. 91 (2009).

Did Congress Strip the Federal Circuit Courts of the Power to Review Denials of Motions to Reopen Immigration Proceedings?

CASE AT A GLANCE

The dramatic amendments to U.S. immigration law in 1996 included various provisions limiting judicial review of the decisions of immigration agencies and officials. One of the broadest such limitations bars review of any decision "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." Nine years after first being ordered deported, the petitioner, Agron Kucana, filed a motion to reopen his immigration proceedings on the grounds that changed country conditions now justified his claim for asylum.

Kucana v. Holder
Docket No. 08-911

Argument Date: November 10, 2009
From: The Seventh Circuit

by Jessica E. Slavin
Marquette University Law School

ISSUE

Does 8 U.S.C. § 1252(a)(2)(B)(ii) bar judicial review of an immigration judge's denial of a motion to reopen immigration proceedings?

FACTS

This case concerns Agron Kucana's appeal from the denial of his second motion to reopen his asylum proceedings. The Seventh Circuit held, contrary to the arguments of both the United States and Mr. Kucana, that it was barred from reviewing the motion to reopen. On appeal, both parties argue that the statutory bar that the Seventh Circuit relied upon, 8 U.S.C. § 1252(a)(2)(B)(ii), does not apply to denials of motions to reopen, because nothing in the immigration statutes "specifie[s]" such motions to be "in the discretion of the Attorney General," as required by § 1252(a)(2)(B)(ii).

Petitioner's Initial Immigration Proceedings and First Motion to Reopen

The petitioner, Agron Kucana, is an Albanian citizen who came to the United States in July 1995 on a visitor's visa, which authorized him to remain in the United States for 90 days. He overstayed his visa, and in May 1996 filed an application for asylum and withholding of removal, on the grounds that he had fled severe past persecution and had a well-founded fear of future persecution in Albania due to his active involvement in the Albanian Democratic Party and the sharp divisions that developed in that party after it took power in 1992. In his application, Kucana claimed that after a long series of threats, arrests, and beatings, he finally fled when he received a warrant for his arrest on charges of "agitating against the party." His final hearing in the asylum case was scheduled for October 9, 2007.

Kucana failed to appear at his hearing, apparently because he slept through his alarm. His failure to appear meant that consistent with 8 U.S.C. § 1229a, the Immigration Judge issued an *in absentia* order for Kucana's removal from the United States. Kucana filed a motion to reopen the proceedings, explaining that he had overslept and arrived at the immigration court soon after the *in absentia* order was issued. The Immigration Judge denied that motion because it did not satisfy the specific admonition of § 1229a(5)(C)(i) that such an order may only be rescinded based on a showing of "exceptional circumstances," i.e., circumstances such as battery, serious illness or death, or other compelling circumstances beyond the alien's control. The judge's decision that Mr. Kucana could not prove "exceptional circumstances" justifying a motion to reopen was affirmed by the Board of Immigration Appeals in May 2002.

Enactment of Immigration Reform Limiting Judicial Review

In September 1996, while Kucana's asylum application was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), which provides in part that:

> Notwithstanding any other provision of law (statutory or nonstatutory), … and regardless of whether the … decision … is made in removal proceedings, no court shall have jurisdiction to review … any decision … of the Attorney General … the authority for which is specified under this subchapter to be in the discretion of the Attorney General … , other than the granting of relief under section 1158(a) [i.e., asylum].

In that same immigration reform legislation package, Congress codified a numerical limitation on motions to reopen that the Department of Justice (DOJ) had recently adopted by regulation.

In the earlier, less sweeping immigration reform of 1990, Congress had directed the DOJ to enact a regulation limiting motions to reopen, and in April 1996, DOJ issued final regulations limiting litigants to a single motion to reopen, filed within 90 days after the final administrative decision. The regulation specifies limited exceptions to the numerical limitation on motions to reopen, including motions to reopen "[t]o apply or reapply for asylum … based on changed circumstances." 8 C.F.R. § 1003.2(c)(2) and (3)(ii).

In IIRAIRA, Congress enacted a similar (but not identical) statutory limitation on motions to reopen, providing that "an alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv)." § 1229a(7)(A). The specified exception is for motions related to certain forms of relief for victims of domestic violence. § 1229a(7)(C)(iv).

Petitioner's Second Motion to Reopen and Appeal to the Seventh Circuit

Kucana filed his second motion to reopen, in June 2006, on grounds of new evidence and changed country conditions supporting his claim for asylum, and on the fact that he was now awaiting another form of immigration relief, as a beneficiary of his mother's "immediate relative" petition on his behalf. The motion was supported by a scholar of Balkan history and modern Albanian politics, who swore that "Agron Kucana has a reasonable and objective basis to fear future prosecution."

This second motion was denied and then appealed to the Board of Immigration Appeals (BIA), which affirmed denial of the motion on two grounds: first, that a second motion to reopen must be filed with the Board (the last decision-maker in the case), and second, that Kucana could not establish that he was now eligible for asylum "based on material changes that have occurred in Albania since his failure to appear," as required to justify a second motion to reopen under 8 C.F.R. § 1003.2(c)(3)(ii).

Kucana appealed to the Seventh Circuit. After the parties briefed and argued, the Seventh Circuit ordered them to submit an additional memoranda regarding a jurisdictional issue: whether § 1252(a)(2)(B)(ii) bars review of a motion to reopen because the regulations specify that the board has discretion to deny motions to reopen. Both the government and Kucana argued that the provision could not apply to bar review of BIA decisions not to reopen because the BIA's discretion is specified, not "under this subchapter," i.e., the statutory subchapter, but only by regulation.

Nevertheless, the Seventh Circuit, in reliance on a prior case holding that § 1252(a)(2)(B)(ii) barred review of decisions made discretionary by regulation, held that the section likewise barred its review of motions to reopen. As the dissenting Judge Cudahy noted, this decision set the Seventh Circuit at odds with all other circuit courts to have considered the issue. The Supreme Court thereafter accepted Kucana's petition for review.

CASE ANALYSIS

Despite its complicated procedural history, the main issue in the case appears to be a relatively straightforward exercise of statutory interpretation. As both Kucana and the solicitor general point out, the actual words of § 1252(a)(2)(B)(ii) stripped the courts of authority to review decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General." They, along with numerous amici, argue that these words unambiguously limit the jurisdiction-stripping effect of this provision to decisions that are defined by statute to as within the attorney general's discretion. No one in the case disputes that it is regulations promulgated under the statute, and not the statute itself, that specifies the BIA's discretion with regard to motions to reopen.

Kucana argues, furthermore, that even if there were any ambiguity, three "principles of statutory construction" strongly favor the interpretation of the majority of the circuits. He also points out that under the Seventh Circuit's rule, there would be no check on agency-level reviews of claims of changed country conditions. Perhaps worse, the decision seems to mean that the executive branch would have the power to decide which of its decisions should be subject to judicial review by specifying which are in its discretion.

The solicitor general's brief reviews the statutory context, which includes a provision that appeals from denials of motions to reopen may be consolidated with appeals challenging the underlying final order, suggesting that Congress foresaw review of motions to reopen. The government also reviews the legal history of motions to reopen in immigration court, emphasizing that the motion was a judicial creation that had only months earlier been put into regulation, when Congress first enacted provisions relating to motions to reopen in 1996. "The federal courts long have reviewed denials of motions to reopen, and Congress did not indicate any intention to change that practice," the solicitor general argues.

The brief of the court-appointed amicus curiae in support of the judgment essentially argues that the legislative history and purpose behind IIRAIRA and, specifically, § 1252(a)(2)(B)(ii), show that Congress wanted to enact a sweeping bar, and that the history of motions to reopen in immigration court confirms that Congress must have meant this bar to extend to motions to reopen. The brief recounts the history of the judicial development of motions to reopen, congressional frustration with delay perceived to follow from the availability of those motions, the Congress-directed promulgation of regulations limiting the availability of those motions, and the ultimate enactment of § 1252(a)(2)(B)(ii). "All told," the amicus argues, "reading 'under this subchapter' to include decisions and actions made discretionary by a regulation promulgated under the subchapter is not only 'most in accord with context and ordinary usage, …" but also "most compatible with the surrounding body of law. … "

SIGNIFICANCE

The case has great significance. Removing all judicial review from denials of motions to reopen would obviously insulate a large number of immigration decisions from any judicial review. Such a situation appears troublesome in view of widely perceived weaknesses in the quality of decision making at the administrative level, some of which are addressed in the amicus brief of the National Immigrant Justice Center and other immigration advocates.

Furthermore, motions to reopen are just one of many types of decisions that immigration regulations place in the discretion of the "Attorney General or the Secretary of Homeland Security," (i.e., virtu-

ally all immigration-related agencies and officials). If the Seventh Circuit's interpretation were applied broadly, then a wide swath of decisions that have been subject to judicial review will be left to the absolute discretion of the administrative decision makers. The ACLU, for these reasons, urges the Court to limit its consideration to the particular question before it, whether judicial review of motions to reopen is barred, and to leave for another day questions of whether review of other decisions and actions is barred, as the lower courts continue to consider and develop law concerning those questions.

The argument of the amici supporting the judgment, the Washington Legal Foundation and Allied Educational Foundation, attempts to shift the focus to an entirely new basis for denying review, arguing that Kucana's second motion to reopen was barred in the first place, because Congress did not expressly incorporate the "changed circumstances" exception to the numerical limitation on motions to reopen. These amici argue that "[i]n light of the timing … the legislation can only be viewed as an explicit rejection of the Department of Justice rule permitting waiver of the one-motion-to-reopen rule with respect to claims for asylum and withholding of removal."

In addition to being at odds with U.S. treaty obligations not to return refugees to persecution, such an interpretation seems to raise serious constitutional questions that have in recent years led the Court to favor interpretations of IIRAIRA that preserve judicial review. See *INS v. St. Cyr,* 533 U.S. 289 (2001), and *Zadvydas v. Davis,* 533 U.S. 678 (2001). In fact, in response to such concerns, Congress passed a post-IIRAIRA amendment that provides that nothing in that legislation "which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section," § 1252(a)(2)(D). Because Kucana challenged the decision below only as an abuse of discretion, this case does not seem to provide an opportunity to apply that provision.

Jessica E. Slavin is an associate professor of legal writing at Marquette University Law School in Milwaukee, Wisconsin. In addition to legal writing and appellate advocacy, she teaches a seminar in refugee law. She can be reached at jessica.slavin@marquette.edu or 414.288.7486.

PREVIEW of United States Supreme Court Cases, pages 91–93.

ATTORNEYS FOR THE PARTIES

For Petitioner Agron Kucana (Rick M. Schoenfield, 312.334.4800)

For Respondent Eric H. Holder Jr., Attorney General (Elena Kagan, Solicitor General, 202.514.2217)

AMICUS BRIEFS

In Support of Petitioner Agron Kucana

American Civil Liberties Union (Lee Gelernt, 212.549.2500)

Law Professors (Anne Harkavy, 202.663.6000)

National Immigrant Justice Center et al. (Jeffrey T. Green, 202.736.8000)

In Support of Respondent Eric H. Holder Jr., Attorney General

Washington Legal Foundation et al. (Richard A. Samp, 202.588.0302)

In Support of the Judgment Below

Court-Appointed Amicus Curiae (Amanda C. Leiter, 202.319.6755)