



Background on Judicial Review of Immigration Decisions

“Judicial review” refers to federal court review of an immigration agency decision. Some individuals whose immigration benefits applications are denied or who are ordered removed from the United States may seek judicial review. However, the immigration law contains many technical barriers to accessing the federal courts, including inflexible restrictions on the types of claims that the courts may hear. As a result, under the current system, the federal courts often are prevented from playing their constitutionally-mandated role of providing a check on executive power.

Why Is Judicial Review Important?

Court review provides necessary oversight of government decision-making—review which is essential in immigration cases given that a denied application or a removal order can mean separation from family in the United States or being returned to a country where a person fears for his life. It is inevitable that immigration judges and immigration officers will make mistakes and even serious legal errors, particularly given the high volume of cases and the lack of adequate resources.¹ Over the past decade, federal judges have expressed dismay regarding the quality of immigration judges’ decisions, leading one court to conclude that the “adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”² Moreover, nearly half of all immigrants in immigration court proceedings do not have lawyers to help guarantee a fair proceeding.

Federal court review adds an important layer of protection—courts can catch inadvertent government mistakes and help ensure that the government is properly interpreting and applying the immigration laws. But equally as important, federal court review builds confidence about the fairness and accuracy of immigration procedures and brings integrity to the system.

Barriers to Judicial Review

Deadline with No Exceptions. The law provides that an appeal of a removal order, called a “petition for review,” must be filed in federal court within 30 days. The 30-day deadline is treated as mandatory and jurisdictional, meaning that there are no exceptions. Moreover, the appeal period begins to run on the day the order is issued. Yet, it may be days or even longer before the person receives the order in the mail, leaving very little time to weigh his options, consult with a lawyer, and put together and file the appeal. This is especially so for immigrants who are detained.

Bars to Review. Congress has placed many restrictions on the types of arguments a person may make on appeal. For example:

- Immigrants are not permitted to challenge “discretionary” determinations made by immigration judges and immigration officers. Applying the so-called “discretionary decision bar,” courts have dismissed cases challenging denials of waivers of certain grounds of ineligibility for relief, revocations of visa petitions, and denials of applications for permanent residence.
- Asylum applicants cannot seek review of some asylum eligibility requirements, including whether their application was filed on time or qualified for important exceptions to the filing deadline.
- Immigrants who are ordered removed through a truncated, administrative process called “expedited removal” generally are barred from appealing their removal orders.
- Immigrants with criminal offenses—even minor offenses—are barred from appealing factual findings in their cases.
- Immigrants are generally only allowed to challenge improper agency actions in their individual cases, even when the problems are system-wide and difficult to address on a case-by-case basis.

Immediate Deportation and No Automatic Stay. Although a person may pursue judicial review from outside the United States, as a practical matter, it is difficult—if not impossible—for individuals without lawyers to do so, and even those with lawyers face logistical hurdles. Nonetheless, the government often deports a person before the 30-day appeal period has run, sometimes even before a person has received the removal order in the mail. Further, filing an appeal does not automatically stop the government from deporting the person. Finally, even immigrants who are able to pursue their appeals from abroad and who prevail may be stranded outside the United States because the law is not clear about the procedures for return.

Endnotes

1. In April 2013, the immigration courts had a backlog of 330,533 cases, with cases pending an average of 553 days. See TRAC, Immigration Court Backlog Tool, http://trac.syr.edu/phptools/immigration/court_backlog/. There are approximately 260 immigration judges nationwide charged with handling the entire docket. See Executive Office for Immigration Review, Office of the Chief Immigration Judge, <http://www.justice.gov/eoir/ocijinfo.htm>.
2. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). See also *id.* at 829 (cataloguing criticism by the courts of appeals of immigration judge misconduct and incompetence).