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Immigration Courts Need Judicial Review, Ex-Judges Say

By **Jennifer Doherty**

Law360 (September 7, 2021, 10:05 PM EDT) -- Nearly three dozen former immigration judges added their voices Tuesday to a U.S. Supreme Court case concerning the ability of appellate courts to review Board of Immigration Appeals decisions, saying that power often corrects errors in immigration proceedings.

The 35 ex-immigration judges, like the American Immigration Council, the National Immigration Litigation Alliance, and a band of law professors, which also filed amicus briefs Tuesday, are calling on the high court to **overturn an Eleventh Circuit decision** holding that federal courts lack the authority to review non-discretionary BIA determinations when it comes to certain types of deportation relief.

"Both [immigration judges] and the BIA face heavy caseloads and are under significant pressure to complete cases rapidly. Review by an Article III court of objective, non-discretionary determinations generally improves outcomes and builds confidence in a system of adjudication," the former immigration judges wrote.

"There have been numerous important examples over the years of federal appellate decisions sharply criticizing [immigration judges] or the BIA for error," they continued, including cases involving the same forms of discretionary relief currently before the justices.

The petitioners in the case are a family of Indian immigrants who were found inadmissible based on a Georgia driver's license application the father, Pankajkumar Patel, filled out in 2008. On the form, Patel checked a box stating that he was a U.S. citizen, when in reality he had applied for permanent residency.

Under the federal immigration statute, falsely representing oneself as a U.S. citizen to gain federal or state benefits is cause for inadmissibility to the U.S.

A divided BIA panel upheld that decision on appeal and Patel and his family appealed again to the Eleventh Circuit, which found — both in panel and en banc — that 8 USC Section 1252 stripped appeals courts of jurisdiction to review the board's decision on anything besides questions of law.

To the eyes of the former immigration judges, the circuit court's position conflicted with lawmakers' clear intent in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the last major immigration legislation enacted in the U.S.

While that law protects discretionary decisions that come out of the immigration courts — which are housed within the executive branch, under the U.S. Department of Justice — it hands Article III courts the power to review "black-and-white, non-discretionary" decisions that determine whether immigrants will be eligible for discretionary relief, they said.

The Patels' case offered a good example of the value federal court review could offer, the judges argued. The immigration judge and the BIA both found Patel lacked credibility based on their incorrect understanding of Georgia's laws around driver's license eligibility.

"That misunderstanding of state law — which drove the outcome of the immigrant's petition — is precisely the type of predicate non-discretionary determination that Article III courts are well-suited

to review," the former judges said.

Other advocates came at the issue from different angles.

The National Immigration Litigation Alliance and National Immigrant Justice Center filed a joint brief arguing that the Eleventh Circuit's approach would leave any green card applicants who were not in removal proceedings without any way to appeal the decision if their applications are denied.

The Eleventh Circuit held that Section 1252 allowed federal circuit courts to review questions of law in cases when the immigration courts rejected an application for adjustment of status. But green card applicants who are not facing imminent removal from the U.S. do not interact with the immigration courts. Instead, they apply through U.S. Citizenship and Immigration Services. Any legal challenge to the agency's decision would have to begin in a district court, an option not allowed by the Eleventh Circuit decision.

"The practical consequences of precluding judicial review of unpublished administrative decisions by USCIS Officers are severe. The lack of judicial review leads to 'secret agency law' that has proven to be subject to frequent error," the advocacy groups told the high court.

Another team of immigrant advocates led by the American Immigration Council argued that the Eleventh Circuit's position would lead the U.S. Department of Homeland Security to game the immigration court system by leaving out potential immigration charges when it summoned migrants to removal proceedings.

"The Eleventh Circuit's erroneous reinterpretation of Section 1252(a)(2)(B)(i) gives rise to a perverse and deleterious consequence: the government can avoid judicial review solely by the way it charges an immigration case," the organizations said. "Specifically, under the Eleventh Circuit's approach, DHS can avoid judicial review of the applicability of grounds of inadmissibility by failing to include all potential grounds in the Notice to Appear, and then later asserting previously excluded grounds of inadmissibility as a statutory bar to discretionary relief."

Finally, a group of law professors highlighted the high court's traditional preference for holding agency decisions accountable to judicial review as well as the immigration rule of lenity, which mandates that ambiguities in statutory language should be resolved in immigrants' favor.

"Accordingly, when a statute is ambiguous, this Court has repeatedly applied the rule of lenity to avoid the harsh penalty of deportation," the professors said.

Each amicus brief noted that the Eleventh and Fourth circuits currently stand as outliers among their sister circuits, with all the rest favoring judicial review.

The Patels' attorney, Ira J. Kurzban, told Law360 that Tuesday's amicus briefs "provide important insight and context to the dangers of" the Eleventh Circuit's position.

"Preserving review of relief in removal proceedings is critical to maintain a fair immigration system," he said.

The U.S. Department of Justice does not comment on pending litigation.

The Patel family is represented by Ira J. Kurzban of Kurzban Kurzban Tetzeli and Pratt PA.

The government is represented by acting Solicitor General Brian H. Fletcher.

The former immigration judges are represented by Richard W. Mark, Amer S. Ahmed and Chris Jones of Gibson Dunn & Crutcher LLP.

The American Immigration Council and other organizations on the brief are represented by Adam S. Gershenson, Zachary Sisko, Kathleen Hartnett and Julie Veroff of Cooley LLP.

The law professors are represented pro bono by Holly L. Henderson-Fisher, Aaron Murphy, David E. Carney, Devin Benavidez and Joseph D'Antonio.

The National Immigration Litigation Alliance is represented by its own Mary Kenney. The National Immigrant Justice Center is represented by its own Charles Roth. Both organizations are also represented by Matthew P. Gordon, Rachel Dallal, Sopen B. Shah and Will M. Conley of Perkins Coie LLP.

The case is Pankajkumar S. Patel et al. v. Merrick B. Garland, case number 20-979, in the Supreme Court of the United States.

--Editing by Jill Coffey.
