PRACTICE ALERT[1]:
The Impact of *Barton v. Barr* on Eligibility for Cancellation of Removal

May 5, 2020

On April 23, the Supreme Court issued an adverse, 5-4 decision in *Barton v. Barr*, a case regarding the "stop-time rule" and eligibility for cancellation of removal under the Immigration and Nationality Act ("INA"). *See Barton v. Barr*, No. 18-725 (U.S. Apr. 23, 2020). The Court held that committing an offense "listed in" the inadmissibility grounds at INA § 212(a)(2) stops time for purposes of cancellation, even for an admitted lawful permanent resident ("LPR") who cannot be charged as removable under the inadmissibility grounds. Slip op. at 14.

One of the statutory requirements for LPR cancellation is seven years of continuous residence following admission. INA § 240A(a)(2). The "stop-time rule" at INA § 240A(d)(1)(B) lists the circumstances when commission of an offense stops the accrual of time toward this continuous residence requirement. The provision is triggered when a noncitizen "has committed an offense referred to" in the criminal inadmissibility grounds at INA § 212(a)(2) that "renders" the noncitizen "inadmissible" under INA § 212(a)(2) or "removable" (deportable) under the criminal deportability grounds at INA § 237(a)(2). *Barton* presented the question of whether a "noncitizen who has already been admitted, and is not seeking readmission" can "be deemed inadmissible" for purposes of the stop-time rule. Dissent at 7. The majority answered the question in the affirmative. Slip op. at 14.

The Court's ruling will primarily cut off cancellation eligibility for LPRs[2] who cannot be charged as removable under the inadmissibility grounds, but have committed an offense that falls under those grounds—i.e., those who are "hypothetically . . . inadmissible." Dissent at 8. *Barton* reverses the holding of the Ninth Circuit in *Nguyen v. Sessions*, 901 F.3d 1093 (9th Cir. 2018), and upholds published decisions from the Second and Fifth Circuits. This Practice Alert summarizes the *Barton* decision and briefly describes its potential impact on cancellation eligibility. A more in-depth Practice Advisory about *Barton* and its implications in immigration cases is forthcoming.

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[1] Practice alerts identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice alerts do not replace independent legal advice provided by an attorney or representative familiar with a client's case.

[2] The decision will also impact eligibility for the other two forms of cancellation of removal, non-LPR cancellation under INA § 240A(b)(1) and VAWA cancellation under INA § 240A(b)(2), though less so.

NOTES FOR PRACTITIONERS

- LPRs will be subject to the stop-time rule if they are convicted of an offense referred to in INA § 212(a)(2) within the first seven years of their residence after having been admitted in any status, regardless of whether they are charged as removable under INA § 212(a) (inadmissibility grounds) or INA § 237(a)(2) (deportability grounds).

- LPRs may be subject to the stop-time rule even without conviction, because several INA § 212(a)(2) grounds can be established based on commission or admission to the essential elements of an offense. *E.g.*, INA § 212(a)(2)(A)(i)(I) (CIMT), INA § 212(a)(2)(A)(i)(II) (offense relating to a controlled substance). Given *Barton*, DHS counsel or IJs in removal proceedings may seek to elicit admissions to inadmissible offenses in order to pretermit cancellation of removal. The BIA and INA impose stringent requirements for an admission to trigger a ground of inadmissibility, and advocates should be prepared to push back and argue that standard has not been met in an individual's case.[3] During removal proceedings and USCIS interviews, advocates should raise appropriate objections to questions about conduct that could trigger the stop-time rule. Advocates should also advise LPRs traveling abroad about the risks of CBP officers trying to elicit admissions to inadmissible offenses, and their rights against self-incrimination and rights to reentry.

- Practitioners should challenge any attempt by DHS to reopen the cases of LPRs already granted cancellation of removal.

SUMMARY OF DECISION

A. Barton's proceedings before the IJ, BIA, and Eleventh Circuit

Mr. Barton is a longtime LPR with extensive U.S.-citizen family ties, U.S.-citizen children, community involvement, and work history. Dissent at 5. The government initiated removal proceedings against him, charging him with removability under the grounds of deportability at INA § 237(a)(2), on the basis of two convictions. Slip op. at 5. Mr. Barton was an admitted LPR and subject only to the grounds of deportability at the time he was placed into removal proceedings. An admitted LPR is not removable unless deportable under INA § 237. *See* INA § 240(e)(2). LPRs cannot be charged under the grounds of inadmissibility at INA § 212

[3] *See* IDP, *Removal Defense Checklist in Criminal Charge Cases* (2011), *available at* https://www.immigrantdefenseproject.org/removal-defense-checklist-in-criminal-charge-cases; ILRC, *Warning for Immigrants about Medical and Legalized Marijuana* (2018), *available at* https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana.

unless they are deemed to be seeking an "admission" under INA § 101(a)(13)(C). Barton conceded his removability then sought to apply for LPR cancellation under INA § 240A(a).

To qualify for cancellation of removal, the applicant must have (1) "been . . . lawfully admitted for permanent residence for not less than 5 years," (2) "*resided in the United States continuously for 7 years after having been admitted in any status,*" and (3) "not been convicted of any aggravated felony." INA § 240A(a)(1)-(3) (emphasis added). *See also* Slip op. at 2, 4, 7. However, the seven years of continuous residence "shall be deemed to end" if certain conditions are triggered. INA § 240A(d)(1). This is known as the "stop-time rule." Slip op. at 4. Under subparagraph (d)(1)(B), the continuous residence clock stops "when the [noncitizen] has committed an offense referred to in section [212(a)(2)] . . . that renders the [noncitizen] inadmissible . . . under section [212(a)(2)] . . . or removable . . . under section [237(a)(2) or 237(a)(4)]." Accordingly, if the stop-time rule is triggered before seven years of continuous residence, the LPR is ineligible for cancellation of removal.

In Barton's case, the IJ and BIA found he was ineligible for cancellation because he had been convicted of a crime involving moral turpitude ("CIMT") within the first seven years of his admission to the United States. A single CIMT conviction could not render Barton deportable under INA § 237(a)(2), but is an inadmissible offense under INA § 212(a)(2). The IJ and BIA found that even though the CIMT conviction did not and could not render Barton deportable, it triggered the stop-time rule because it was "referred to in" § 212(a)(2) and "render[ed]" him "inadmissible." INA § 240A(d)(1)(B); Slip op. at 5.

On appeal, the Eleventh Circuit held that "an already-admitted lawful permanent resident—who doesn't need and isn't seeking admission—*can* be 'render[ed] . . . inadmissible' for stop-time purposes." *Barton v. U.S. Att'y Gen.*, 904 F.3d 1294, 1298 (11th Cir. 2018). In rejecting Barton's argument, the Eleventh Circuit sided with the Second, Third, and Fifth Circuits, which previously held that an LPR's inadmissible offense can trigger the stop-time rule even if the LPR does not actually apply for admission. *Heredia v. Sessions*, 865 F.3d 60, 67 (2d Cir. 2017); *Calix v. Lynch*, 784 F.3d 1000, 1008-09 (5th Cir. 2015); *Ardon v. Att'y Gen. of U.S.*, 449 F. App'x 116, 118 (3d Cir. 2011). However, Barton's argument—that as an LPR not seeking admission, he could not be rendered inadmissible—was supported by the Ninth Circuit. *Nguyen v. Sessions*, 901 F.3d 1093, 1097 (9th Cir. 2018) ("We can find no provision in the [INA] . . . where inadmissibility is divorced from the context of seeking admission.").

B. Majority opinion in *Barton*

Barton's petition for a writ of certiorari and the Solicitor General's brief in opposition frame the issue in his case in virtually the same way: whether for purposes of the stop-time rule, an offense renders an already-admitted noncitizen inadmissible. Justice Kavanaugh's majority opinion addresses and answers this question, finding an admitted LPR or noncitizen who is not seeking admission is rendered inadmissible for purposes of the stop-time rule by commission of an offense listed at INA § 212(a)(2). However, in the majority opinion, the Court somewhat reformulated the question it was deciding as "whether the offense that precludes cancellation of removal . . . must also be one of the offenses of removal." Slip op. at 5. From there, the Court

proceeded with its statutory analysis, finding that "[a]s a matter of statutory text and structure," Barton was not eligible for cancellation of removal because of the stop-time rule. Slip op. at 10.

The majority first described Barton as arguing that "the statute's overall structure with respect to removal proceedings demonstrates that a § [212(a)(2)] offense may preclude cancellation of removal only if that § [212(a)(2)] offense was one of the offenses of removal." Slip op. at 11. The Court disagreed with Barton, concluding that the INA "uses [§ 212(a)(2)] offenses as a shorthand cross-reference for a category of offenses that will preclude cancellation of removal if committed during the initial seven years of residence." Slip op. at 12. The Court contrasted the stop-time provision with other parts of the INA where the text ties a particular immigration consequence or impact to "the offense of removal." Slip op. at 12 (citing, *inter alia*, INA § 236(a), (c)(1) (immigration detention of noncitizens who have committed inadmissible or deportable offenses)). According to the Court, the stop-time provision "does not employ similar language." Slip op. at 12.

Second, the majority described Barton as arguing that as a textual matter, he cannot be "render[ed]" inadmissible if he cannot be "actually adjudicated as inadmissible and denied admission to the United States." Slip op. at 13. Again the Court disagreed with Barton, finding that the INA's "statutory text . . . employs the term 'inadmissibility' as a status that can result from, for example, a noncitizen's . . . commission of certain offenses listed in [INA § 212(a)(2).]" Slip op. at 13. For the Court, the "status" of being inadmissible does not depend on a noncitizen being "found inadmissible in a subsequent immigration removal proceeding." Slip op. at 13. The Court justifies this position by describing other immigration provisions where an admitted noncitizen "is inadmissible" if they have committed an inadmissible offense, specifically citing the inadmissibility bars to adjustment of status and temporary protected status. Slip op. at 14 ("Congress has employed the concept of 'inadmissibility' as a status in a variety of statutes similar to the cancellation-of-removal statute, including for lawfully admitted noncitizens."). The Court summarily rejected Barton's argument that admitted noncitizens seeking adjustment of status are "seeking constructive admission." Instead, it concluded that "noncitizens who are convicted of [INA § 212(a)(2)] crimes are inadmissible and in turn may suffer certain immigration consequences, even though those lawfully admitted noncitizens cannot necessarily be removed solely because of those [§ 212(a)(2)] offenses." Slip op. at 15.

Third, the Court dismissed Barton's argument that the government's reading of the stop-time provision would make "redundant surplusage" of the provision's cross-reference to INA § 237(a)(2). Slip op. at 16. The stop-time rule is triggered "when the [noncitizen] has committed an offense referred to in section [212(a)(2)] . . . that renders the [noncitizen] inadmissible . . . under section [212(a)(2)] . . . *or* removable . . . under section [237(a)(2) or 237(a)(4)]." INA 240A(d)(1)(B) (emphasis added). The Court acknowledged that

> Under the Government's interpretation, it is true that the reference to § [237(a)(2)] also appears to be redundant surplusage. Any offense that is both referred to in § [212(a)(2)] and an offense that would render the noncitizen deportable under § [237(a)(2)] would also render the noncitizen inadmissible under § 212(a)(2)].

Slip op. at 16. But the Court brushed aside this key question of statutory interpretation, noting that "[s]ometimes the better overall reading of the statute contains some redundancy." Slip op. at 16. Legal scholars have taken particular issue with this part of the Court's opinion.[4]

Finally, the Court rejected Barton's argument that for an inadmissible offense to preclude cancellation, "the noncitizen must at least have been *capable* of being charged with a [§ 212(a)(2)] inadmissibility offense as the basis for removal." Slip op. at 17. The Court tersely states that as a "recidivist statue," Barton's conclusion is not correct.

C. Dissenting opinion in *Barton*

Justices Sotomayor, Ginsburg, Kagan, and Breyer dissented, finding that a "noncitizen who has already been admitted, and is not seeking readmission, cannot be charged with any ground of inadmissibility and thus cannot be deemed inadmissible." Dissent at 7. The dissent reasoned that an offense cannot "render" the noncitizen inadmissible "if, like Barton, he or she was admitted years earlier and does not seek readmission." Dissent at 11. The dissent found that the majority "conflat[ed] the terms "inadmissibility" and "deportability." Dissent at 1.

The dissenting justices emphasized the historically significant distinction between inadmissibility and deportability under the INA. Dissent at 2. Citing to the amicus brief of immigration law professors and the Court's precedent in *Judulang v. Holder*, 565 U.S. 42 (2011), the dissent explained that prior to 1996, "noncitizens seeking physical entry were placed in 'exclusion proceedings', while those already physically present were placed in 'deportation proceedings.'" Dissent at 3 (internal quotation omitted). Through IIRIRA's legislative amendments, "the immigration laws have retained their two-track structure. Inadmissibility and deportability remain separate concepts, triggered by different grounds." Dissent at 3. "These separate categories and procedures—treating deportable noncitizens more generously than inadmissible noncitizens, and treating one group of deportable noncitizens (LPRs) the most generously of all—stem from one animating principle. All noncitizens in this country are entitled to certain rights and protections, but the protections afforded to previously admitted noncitizens and LPRs are particularly strong." Dissent at 4 (citing *Demore v. Kim*, 538 U.S. 510, 543-544 (2003) (Souter, J. concurring in part and dissenting in part)). "By using separate terms and grounds for two groups of people, the stop-time rule thus reflects the two-track dichotomy for inadmissible or deportable noncitizens that pervades the INA." Dissent at 5.

Analyzing the text of the stop-time rule, the dissent found that the because the statute "uses the terms 'removable' (*i.e.*, deportable) and 'inadmissible,' . . . the Court must analyze the rule against the INA's historic two-track backdrop." Dissent at 8. "That context confirms that the term 'inadmissible' cannot refer to a noncitizen who, like Barton, has already been admitted and is not seeking readmission." Dissent at 8. The dissent disagreed with the majority's holding regarding statutory "surplusage" and the stop-time rule's reference to the criminal grounds of deportability at INA § 237(a)(2), finding that under the Court's precedent, "[a]mong 'the most basic interpretive canons' is 'that a statute should be construed so that effect is given to all its

[4] *See, e.g.*, N. Morawetz, *The Illogic and Cruelty of Barton v. Barr* (Apr. 23, 2020), *available at* https://lawprofessors.typepad.com/immigration/2020/04/guest-post-nancy-morawetz-the-illogic-and-cruelty-of-barton-v-barr.html.

provisions, so that no part will be inoperative or superfluous, void, or insignificant.'" Dissent at 9 (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

The dissent then engaged the majority's observations that there are contexts in which an admitted noncitizen is subject to the grounds of inadmissibility. Slip op. at 14. The dissent found that "adjustment of status"—which the majority cited as a primary example of a statutory scheme subjecting admitted noncitizens to the grounds of inadmissibility—is "an express proxy for admission," or put another way, "an admissions process that occurs inside the United States as opposed to outside of it." Dissent at 9-10. In distinguishing other places in the INA where admitted noncitizens can be deemed inadmissible, the dissent noted that those provisions are "few . . . within the expansive INA" and not operable "exclusively in removal proceedings—where the dichotomy between inadmissibility and deportability is most important." Dissent at 10. By contrast, the stop-time rule operates only in the context of removal proceedings. The dissent also disagreed with the majority's comparison to the detention statute at INA § 236. Dissent at 11.

The dissent further objected to the majority opinion for "reach[ing] a different result only by contorting the statutory language and breezily waving away applicable canons of construction." Dissent at 12. The majority's reading of the statute "will[s] . . . out of existence" the stop-time rule's express statutory requirement that the offense render the noncitizen inadmissible or deportable, not just that the offense be "referred to" in the inadmissibility grounds at INA § 212(a)(2): "[h]ad Congress intended for commission of a crime in [§ 212(a)(2)] alone to trigger the stop-time rule, it would have said so." Dissent at 12.