national IMMIGRATION project of the National Lawyers Guild

NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

Practice Advisory
***Nasrallah v. Barr*: Judicial Review of Factual Challenges to CAT Decisions**[1]
June 11, 2020

Introduction

On June 1, 2020, the Supreme Court issued a positive decision in *Nasrallah v. Barr*, 590 U.S. __ (2020). The question in *Nasrallah* was whether the jurisdiction stripping language in 8 U.S.C. § 1252(a)(2)(C) barred judicial review over factual challenges to denials of protection under the Convention Against Torture ("CAT"). The Court ruled the statute does not bar such review. This practice advisory provides an overview of the *Nasrallah* decision and describes the key implications of its holding.

NOTES FOR PRACTITIONERS

- *Nasrallah* overturns case law in eight circuits. Before *Nasrallah*, most circuits barred review over CAT denials except for legal or constitutional error.
- The 7-2 decision in *Nasrallah* adopts nationwide the rule of the Seventh Circuit.
- The decision may suggest that statutory withholding decisions will also be reviewable for factual error, but the Court did not decide that issue, so adverse circuit case law remains in force unless reversed by the circuits.
- The Ninth Circuit is currently the only circuit that permits fact review over withholding denials, and that court permits review only where it was not denied due to the particularly serious crime bar. *Nasrallah* does not overturn that case law.

[1] Publication of the National Immigration Project of the National Lawyers Guild (NIPNLG) and the National Immigrant Justice Center (NIJC), 2020. This practice advisory is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). This practice advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case. Counsel should independently confirm whether the law has changed since the date of this publication. The authors of this practice advisory are Charles Roth, NIJC director of appellate litigation, and Khaled Alrabe, NIPNLG Staff Attorney. The authors would like to thank Keren Zwick, Nancy Morawetz, Sirine Shebaya, and Jennifer Kelso for their review and comments.

I. *Nasrallah* Decision

A. Brief Summary

Nidal Khalid Nasrallah, a Lebanese citizen, moved to the United States in 2006 at the age of 17 and became a lawful permanent resident in 2007. In 2010, he pled guilty to two counts of receiving stolen property under 18 U.S.C. § 2315. DHS subsequently charged him with being removable for having been convicted of a crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i). In his immigration proceedings, the immigration judge sustained the charges and found Mr. Nasrallah removable but granted him CAT relief because he would likely be tortured if returned to Lebanon. On appeal, the Board of Immigration Appeals ("BIA") vacated the order granting CAT relief.

Mr. Nasrallah appealed the BIA decision to the Eleventh Circuit Court of Appeals challenging the Board's holding that he would not likely be tortured if returned to Lebanon. Relying on circuit precedent, the Eleventh Circuit held that 8 U.S.C. § 1252(a)(2)(C) and (D) precluded its review of Mr. Nasrallah's challenge. *Nasrallah* v. *U. S. Att'y Gen.,* 762 F. App'x 638, 643 (2019).[2]

The Supreme Court granted Mr. Nasrallah's petition for certiorari and accepted the case for review. There had been a circuit split, where eight circuit courts, including the Eleventh, held that § 1252(a)(2)(C) precluded judicial review of factual challenges to CAT orders and two circuits going the other way. In a 7-2 decision, the Court resolved this split and held that courts of appeals are not barred from such review, overturning the Eleventh Circuit and the majority of circuit courts.

B. Supreme Court Holding

Justice Kavanaugh, writing for the Court, began by noting that the issue before the Court is "narrow" and limited to whether the courts of appeals have jurisdiction to review factual challenges to CAT orders by a noncitizen who is removable for committing a crime specified in § 1252(a)(2)(C). *Nasrallah v. Barr*, 590 U.S. __, No. 18-1432, slip op. at 2 (2020). The case does not directly address judicial review of other forms of relief such as asylum or statutory withholding.

The Court held that the limits on judicial review of "final orders" as set forth in § 1252(a)(2)(C) and (D) do not preclude factual challenges to CAT orders because they are not "final orders." *Id.* at 8. The Court based its reasoning on a close reading of the statutory structure governing judicial review of final orders of removal and CAT relief.

---

[2] Mr. Nasrallah was purportedly subject to the bar on judicial review in 8 U.S.C. § 1252(a)(2)(C) based on a single crime involving moral turpitude ("CIMT"). In actuality, one CIMT does not trigger 8 U.S.C. § 1252(a)(2)(C), but Eleventh Circuit case law erroneously holds that it does. *Keungne v. U. S. Att'y Gen.*, 561 F. 3d 1281, 1283 (11th Cir. 2009). Mr. Nasrallah's case was litigated on the assumption that § 1252(a)(2)(C) applied. *See Nasrallah*, slip op. at 4 n.3.

a. Statutory Framework

i. Judicial Review of "a Final Order of Removal"

The Court's analysis began by clarifying the set of relevant statutes that govern judicial review of final orders of removal. *Nasrallah*, slip op. at 5.

First, under 8 U.S.C. § 1252(a)(1), a final order of removal is reviewable only in the courts of appeals. *Id.* A final order of removal in this context is defined as "a final order 'concluding that the [noncitizen] is deportable or ordering deportation.'" *Id.* (quoting 8 U.S.C. § 1101(a)(47)(A)). Second, under 8 U.S.C. § 1252(b)(9), Congress consolidated judicial review by requiring that "judicial review 'of all questions of law and fact…arising from any action taken or proceeding brought to remove [a noncitizen] from the United States…shall be available only in judicial review of a final order under this section.'" *Id.* Third, judicial review ***of final orders*** is limited where an individual is removable for having committed a crime specified in § 1252(a)(2)(C). *Id*. at 7. In such cases, "a court of appeals may review constitutional or legal challenges to a final order of removal, but the court of appeals may not review *factual* challenges to a final order of removal." *Id.* (citing 8 U.S.C. §§ 1252(a)(2)(C)-(D)).

Under this scheme, individuals who have a final order based on having committed crimes described in § 1252(a)(2)(C) may only challenge their final order of removal in a court of appeals and when doing so are limited only to constitutional or legal challenges.

ii. Convention Against Torture

Convention Against Torture ("CAT") relief is not codified within the Immigration and Nationality Act ("INA"). In 1998, Congress mandated that the agency enact regulations to implement CAT protections. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242(b), 112 Stat. 2681, 2681-822. In removal proceedings, noncitizens may apply for CAT withholding or CAT deferral (the distinction is irrelevant for these purposes) if they can show that "it is more likely than not that [they] would be tortured if removed to the proposed country of removal." 8 CFR § 1208.16(c)(2); *see also* 8 CFR § 1208.17(a). CAT relief cannot be denied as a matter of discretion: if the noncitizen meets her burden an immigration judge must grant relief. Notably, an order granting CAT relief does not affect the underlying final order; it merely prevents the government from removing a noncitizen to the country where they are likely to be tortured notwithstanding the final order of removal. *See Nasrallah*, slip op. at 8.

In *Nasrallah*, the Court clarified the statutory scheme governing the judicial review of CAT orders. First, as with final orders of removal, Congress channeled review of CAT orders to courts of appeals under 8 U.S.C. § 1252(a)(4). *Id*. at 6. Second, under § 2242(d) of the FARRA, judicial review of CAT orders is authorized "as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252)." *Id.* (quoting FARRA § 2242(d)).

b. Factual Challenges of CAT Decisions not Barred by 8 U.S.C. §§ 1252(a)(2)(C) and (D)

With this statutory framework in mind, the Court held that the limitations on judicial review of final orders of removal described in 8 U.S.C. §§ 1252(a)(2)(C) and (D) do not bar challenges to CAT orders. Justice Kavanaugh reasoned that "[t]he relevant statutory text precludes judicial review of factual challenges to final orders of removal—*and only to final orders of removal*" and a CAT order "is not itself a final order of removal because it is not an order 'concluding that the alien is deportable or ordering deportation.'" *Id.* at 7 (emphasis added) (citing 8 U.S.C. § 1101(a)(47)(A)).

First, the Court held that "[f]or purposes of this statute, final orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal." *Id.* at 8. Second, because "a CAT order is distinct from a final order of removal and does not affect the validity of the final order of removal," it "does not merge into the final order of removal." *Id.* at 9. The Court held that its decision in *Foti v. INS*, 375 U. S. 217 (1963), was no longer good law as to the definition of a final order of removal, now that the statute has a definition for that term. *Id.* at 10.

Since a CAT order is not a final removal order—even if it is reviewed together with a final removal order—it is not governed by 8 U.S.C. § 1252(a)(2)(C). Therefore, judicial review over CAT claims is not limited to the legal and constitutional claims permitted under 8 U.S.C. § 1252(a)(2)(D).

Neither § 2242(d) of FARRA nor 8 U.S.C. § 1252(b)(9) disturb this analysis. Language requiring that CAT review occur "as part of the review of a final order of removal," FARRA § 2242(d), and the "zipper clause" of 8 U.S.C. § 1252(b)(9) merely indicate that a CAT order "may be reviewed together with the final order of removal." *Id.* at 8. It does not transmogrify a CAT order into a removal order.

In sum, the Court held that while CAT orders are reviewed in tandem with final orders of removal, "as a matter of straightforward statutory interpretation, Congress's decision to bar judicial review of factual challenges to final orders of removal does not bar judicial review of factual challenges to CAT orders." *Id.* at 9.

II. Implications of *Nasrallah*

a. Factual Challenges to CAT Decisions

The first key takeaway from *Nasrallah* is that noncitizens who are removable for having committed crimes described in §1252(a)(2)(C) are no longer limited to making constitutional and legal challenges to a CAT decision in their petitions for review. Such petitioners may advance factual challenges of BIA and IJ CAT decisions. In establishing that such factual challenges to CAT claims are reviewable, the Court cautioned that review "is highly deferential." *Id.* Courts of appeals must apply a substantial-evidence standard of review whereby the BIA's "findings of

fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Id.* (citing §1252(b)(4)(B)).[3]

With the exception of the Seventh and Ninth circuits, most circuit courts had previously held that they do not have jurisdiction to review factual challenges to CAT claims for individuals subject to § 1252(a)(2)(C). As such, *Nasrallah* overturned binding precedent from eight other circuits including *Gourdet v. Holder*, 587 F.3d 1 (1st Cir. 2009); *Ortiz-Franco v. Holder*, 782 F.3d 81 (2d Cir. 2015); *Pieschacon-Villegas v. Att'y Gen. of U. S.*, 671 F.3d 303 (3d Cir. 2011); *Oxygene v. Lynch*, 813 F.3d 541 (4th Cir. 2016); *Escudero-Arciniega v. Holder*, 702 F.3d 781 (5th Cir. 2012); *Tran v. Gonzales*, 447 F.3d 937 (6th Cir. 2006); *Lovan v. Holder*, 574 F.3d 990 (8th Cir. 2009); *Cole v. Att'y Gen. of U. S.*, 712 F. 3d 517 (11th Cir. 2013); *see also Timoshchuk v. Sessions*, 716 F. App'x 819, 822 (10th Cir. 2017) (holding the same, but unpublished).

b. Factual Challenges to Statutory Withholding of Removal Decisions

The Court explicitly defers for the future the question whether its holding affects statutory withholding of removal under 8 U.S.C. § 1231(b)(3)(A). *Nasrallah*, slip op. at 13 ("that question is not presented in this case."). Nevertheless, *Nasrallah* warrants revisiting case law precluding factual review over withholding decisions because the Court's reasoning should apply equally to statutory withholding of removal.

Like CAT relief, statutory withholding of removal is a mandatory form of relief that applies after a person is found to be removable. The order granting or denying relief is logically and legally distinct from the removal order itself. Under § 1231(b)(3)(A) "the Attorney General may not remove [a noncitizen]" to a country where their "life or freedom would be threatened" due to their "race, religion, nationality, membership in a particular social group, or political opinion." Assuming none of

Options in Pending or Denied Cases where *Nasrallah* would apply:

- For cases already briefed: Consider seeking leave to file supplemental briefing. Reach out to opposing counsel to seek stipulation to jurisdiction over the appeal.
- For recently decided cases: If outside the rehearing window, another option would be to seek certiorari, asking the Supreme Court to grant, vacate, and remand in light of *Nasrallah*.
- For denied cases outside the appeal window: A litigant can ask the Court of Appeals to recall the mandate. *Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998) (inherent power to withdraw the mandate "can be exercised only in extraordinary circumstances"); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567-68 (9th Cir. 1988) (recalling mandate in light of intervening Supreme Court decision); *American Iron and Steel Institute v. EPA*, 560 F.2d 589, 594-95 (3d Cir. 1977) (same); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 n.12 (D.C. Cir. 1971) (noting possibility that subsequent Supreme Court decision showed that original judgment "was demonstrably wrong").

[3] Given the deferential standard for fact review, it will sometimes be inadvisable to focus on factual challenges when legal arguments are also implicated in the case.

the bars to withholding described in § 1231(b)(3)(B) apply, an immigration judge cannot deny withholding where the respondent has met her burden.

Additionally, a decision to withhold removal under § 1231(b)(3)(A) is premised on the existence of an order of removal. Like CAT relief, therefore, a withholding of removal decision "does not affect the validity of the final order of removal." *Nasrallah*, slip op. at 8. Because the Court in *Nasrallah* defined the limitations of § 1252(a)(2)(C) as applying to "only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal," a decision to withhold removal, like CAT decisions, would appear to fall outside of § 1252(a)(2)(C). *Id.* In other words, a withholding of removal decision "is not itself a final order of removal because it is not an order 'concluding that the alien is deportable or ordering deportation'" and therefore the limitations on judicial review of final orders do not apply. *Id.* at 7.

The dissent certainly saw it this way. Justice Thomas wrote that "there is good reason to think that the majority's rule will apply equally to statutory withholding of removal." *Nasrallah*, slip op. at 6 (Thomas, J., dissenting). As he explained:

> Like CAT withholding, statutory withholding is unavailable to aliens who have committed certain crimes. And like CAT relief, statutory withholding seeks to prevent removability and is considered after the alien has been deemed removable. Thus, statutory withholding claims also do not affect the validity of the underlying removal order and, in the majority's view, would not be subject to §1252(a)(2)(C).

Id. at 6-7 (citations omitted).

To the extent that circuit law regarding the reviewability of statutory withholding is inconsistent with *Nasrallah*, practitioners should argue in their petitions for review that such precedent should be overturned. In some circuits, it may be possible to ask one panel to overrule earlier precedent. In other circuits, published decisions are binding on subsequent panels even when they are logically inconsistent with intervening Supreme Court case law. *See U. S. v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013) (to overturn a prior decision, a Supreme Court decision must "be unequivocal, not a mere 'hint' of how the Court might rule in the future."). Advocates will need to consider the applicable case law for each circuit to determine whether an *en banc* rehearing would be required to find jurisdiction.

c. Unaffected Judicial Review

The scope of the decision in *Nasrallah* is relatively narrow. Most judicial review is unaffected.[4]

---

[4] Nothing in *Nasrallah* purports to overrule caselaw holding in the reinstatement context that the 30-day appeal period does not begin to run until the conclusion of reasonable fear / withholding-only proceedings. *See*, *e.g.*, *Ponce-Osorio v. Johnson*, 824 F.3d 502, 505-06 (5th Cir. 2016); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957-59 (9th Cir. 2012); *Ayala v. Sessions*, 855 F.3d 1012, 1017-20 (9th Cir. 2017); *Luna-Garcia v. Holder*, 777 F.3d 1182, 1184-87 (10th Cir. 2015); *Jimenez-Morales v. U.S. Att'y Gen.*, 821 F.3d 1307, 1308 (11th Cir. 2016). For more information see *Practice Advisory: Reinstatement of Removal*, National Immigration Project of the National Lawyers Guild and the American Immigration Council, at 10 (2019).

i. Questions of Law

Only months ago, the Supreme Court found that § 1252(a)(2)(D) includes application of law to fact. *Guerrero-Lasprilla v. Barr*, 589 U. S. __, No. 18-776, slip op. at 11-13 (2020). Under *Nasrallah*, CAT applicants need have no recourse to § 1252(a)(2)(D), because § 1252(a)(2)(C) is not implicated. Nasrallah says nothing about the scope or nature of § 1252(a)(2)(D).

ii. Discretionary questions

Unlike § 1252(a)(2)(C), the bar to review over discretionary matters is not framed in terms of final orders of removal. Rather, that statute bars review over "any judgment regarding the granting of [specified forms of] relief" and "any other decision or action … which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. §§ 1252(a)(2)(B)(i), (ii). Therefore, the statutory question posed in *Nasrallah* is not relevant to § 1252(a)(2)(B).

That said, some loose language in *Nasrallah* may be misread as overturning lower court decisions interpreting § 1252(a)(2)(B). The Court, disclaiming a "slippery slope," characterized §1252(a)(2)(B) as "stat[ing] that a noncitizen may not bring a factual challenge to orders denying discretionary relief." *Nasrallah*, slip op. at 12 (citing *Kucana v. Holder*, 558 U. S. 233, 248 (2010)). The Court stated that *Nasrallah* "therefore has no effect on judicial review of those discretionary determinations." *Id.* Although the majority cites *Kucana* for that proposition, nothing in *Kucana* purports to address factual review. *Cf. Kucana*, 558 U. S. at 247 n.15 (discussing § 1252(a)(2)(B) in terms of "discretionary judgments").

Most circuits have held that § 1252(a)(2)(B) does not preclude review of factual questions, but only over "decisions involving the exercise of discretion." *Sabido Valdivia v. Gonzales*, 423 F.3d 1144, 1148 (10th Cir. 2005). Those cases include *Sepulveda v. Gonzales*, 407 F.3d 59, 63 (2d Cir. 2005); *Sumbundu v. Holder*, 602 F.3d 47, 52-53 (2d Cir. 2010); *Mendez–Moranchel v. Ashcroft*, 338 F.3d 176, 178 (3d Cir. 2003); *Johnson v. Att'y Gen. of U.S.*, 602 F.3d 508, 510 n.2 (3d Cir. 2010); *Mireles–Valdez v. Ashcroft*, 349 F.3d 213, 216 (5th Cir. 2003); *Hadwani v. Gonzales*, 445 F.3d 798, 800 (5th Cir. 2006); *Santana–Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 502 (6th Cir. 2008); *Ortiz–Cornejo v. Gonzales*, 400 F.3d 610, 612 (8th Cir. 2005); *Reyes–Vasquez v. Ashcroft*, 395 F.3d 903, 906 (8th Cir. 2005); *Montero–Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002); *Mamigonian v. Biggs*, 710 F.3d 936, 944-46 (9th Cir. 2013); *Arambula–Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009); *Gonzalez–Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003); *Jimenez-Galicia v. U.S. Att'y Gen.*, 690 F.3d 1207, 1209 (11th Cir. 2012).

Inasmuch as *Nasrallah* explicitly disclaimed any "effect on judicial review [over] discretionary determinations," *Nasrallah*, slip op. at 12, it is unlikely that the Supreme Court meant to overturn this case law without acknowledging it. Still, *dicta* from the Supreme Court is

taken very seriously by lower courts. In some circuits, this language may cause courts to revisit this case law.

d. Conclusion

Nasrallah opens the door to additional review over factual determinations in the CAT context. It is a relatively narrow decision which should have relatively slight impact on immigration matters outside the question presented and the related question of withholding of removal.