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Ex-Immigration Judges Back Trinidadian Man Before Justices

By **Rae Ann Varona**

Law360 (September 6, 2023, 2:45 PM EDT) -- Former immigration judges backed a Trinidad and Tobago native's U.S. Supreme Court plea to overturn a Third Circuit decision holding that a denial of his bid for deportation relief based on exceptional hardship wasn't reviewable, saying federal court review could avoid inconsistencies in the hardship standard's application.

A total of 32 former Executive Office for Immigration Review judges, including former Board of Immigration Appeals members, told the high court in a Tuesday brief supporting Situ Kamu Wilkinson that deeming an immigration court's hardship ruling to be unreviewable by federal courts could hinder the development of uniform precedent on mixed questions of immigration law, noting in their brief that only 0.001% of BIA decisions are precedential.

Lack of review, they said, would be exceptionally problematic given the gravity of deportation as well as resource constraints faced by immigration courts and the BIA.

"Cases like this one — which required the immigration courts below to decide whether to separate a twenty-year resident of the United States from his ailing son based on a few words of statutory text — underscore the value of Article III precedential opinions in promoting predictability and consistency," the former EOIR judges said in an amicus brief.

They said judicial review of the hardship determination would ensure there was a "judicial double-check" on a ruling denying a cancellation of removal, a result they said was often akin to exile and banishment.

Wilkinson's request for a cancellation of removal was based on his role as the income provider for his son and his son's mother, and his son's health issues, including asthma attacks and frequent hospital visits.

The former immigration judges' brief came roughly a week after Wilkinson — whose cancellation of removal bid was denied by both an immigration judge and a BIA panel — **urged** the Supreme Court to overturn the Third Circuit decision affirming the denial. The Supreme Court had agreed to hear his case in **June**.

The Third Circuit, in a split decision, had ruled it had no jurisdiction to review an agency's hardship determination on grounds it was a discretionary judgment call. But Wilkinson argued that because the cancellation statute's hardship provision established a legal standard for immigration judges to apply, his case involved a "mixed question of law and fact," and was thus reviewable.

The former EOIR judges on Tuesday agreed with Wilkinson and said that in their experience, whether someone has met the hardship standard for cancellation of removal is a "classic question of application of law to a set of facts."

If anything, they said that the hardship question was "at root" a legal issue since it requires immigration courts to interpret law, particularly by fleshing out a broad legal standard.

"The BIA's analysis parsing the text and statutory history of the cancellation-of-removal provisions reinforces the conclusion that this inquiry is more legal than factual," the former EOIR judges said.

Many other groups rallied behind Wilkinson by filing friend-of-the-court briefs on Tuesday, including the American Immigration Lawyers Association, and a group of nonprofit organizations that advocate for immigrant survivors of domestic violence.

Like the former immigration judges, AILA, a nonprofit comprising 15,000 members including immigration lawyers and law professors, said the hardship determination was a "classic example" of a reviewable mixed question of law and fact.

Without judicial review, the nonprofit said, noncitizens who have strong claims that their deportation will cause significant hardship to their U.S. citizen family members would have no recourse if immigration judges incorrectly find that they fail to meet the hardship standard for deportation relief.

Also like the former immigration judges, AILA emphasized the risk of inconsistent rulings as being "even more troubling."

"Judicial review is necessary to minimize discrepancies in how this statutory standard is applied to established facts in the immigration courts, and to ensure that noncitizens seeking to care for their families here in the United States received fair review of their applications no matter which IJ adjudicates their claim," AILA said.

Other nonprofits — the Asian Pacific Institute on Gender-Based Violence, ASISTA Immigration Assistance, the National Immigrant Justice Center, National Immigrant Women's Advocacy Project Inc., and Tahirih Justice Center — said denying review would risk limiting or foreclosing hardship reviews for cancellation of removal under the Violence Against Women Act.

VAWA provides a special cancellation-of-removal mechanism for immigrant victims of domestic violence and child abuse and was enacted in 1994 to provide immigration relief for victims, including abused spouses, former spouses and children. Like cancellation of removal available to other noncitizens like Wilkinson, the special rule cancellation of removal under VAWA requires a determination of extreme hardship.

The nonprofits said Tuesday that the federal government's position thus risks hurting immigrant domestic violence victims who already live in fear.

They gave a hypothetical example of a noncitizen who faces deportation because her abusive U.S. citizen spouse turned her in to immigration authorities, who then initiated deportation proceedings against her.

The nonprofits said that even if that noncitizen managed to prepare and present a case for cancellation of removal under VAWA, she could still nonetheless be deported if an immigration judge or a judge on the BIA wrongly decided that she failed to show extreme hardship, perhaps due to a misinterpretation of the statutory standard or a misapplication of law to fact.

"Denying review would exclude any Article III review of a vitally important determination, preventing courts from providing any relief for the agency's error," the nonprofits said. "And it would deny the immigrant victim the opportunity to plead her case in court that she merits the heightened protections Congress promised."

The U.S. Department of Justice and counsel for Wilkinson did not immediately respond to requests for comment Wednesday.

Wilkinson is represented by Jaime Santos, David J. Zimmer and Jesse Lempel of Goodwin Procter LLP, and by Rhonda F. Gelfman of the Law Offices of Rhonda F. Gelfman PA.

The former EOIR judges are represented by Claire M. Guehenno, Donna M. Farag and Thomas G. Sprankling of Wilmer Cutler Pickering Hale & Dorr LLP.

AILA is represented by Lee Turner Friedman and Shikha Garg of Kramer Levin Naftalis & Frankel LLP.

The federal government is represented by Solicitor General Elizabeth Prelogar, and by Brian Boynton, John Blakeley, Claire Workman, and Elizabeth Fitzgerald-Sambou of the Justice Department.

The domestic violence victim advocacy organizations are represented by Zachary D. Tripp, Robert B. Niles-Weed, Rachel M. Kaplowitz, Katheryn Maldonado and Chloe S. Fife of Weil Gotshal & Manges LLP.

The case is Situ Kamu Wilkinson v. Merrick B. Garland, case number 22-666, before the U.S. Supreme Court.

--Editing by Marygrace Anderson.

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