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1st Circ. Says BIA Must Mull If Virus Paused Appeal Deadline

By **Alyssa Aquino**

Law360 (October 26, 2021, 6:09 PM EDT) -- A Jamaican woman who missed her deadline to appeal deportation has another chance to do so after the First Circuit ruled that the Board of Immigration Appeals should consider her extension request, filed in the early days of the pandemic.

Andrea Joy James had missed a March 2020 deadline to appeal an order of removal while detained in a facility that has fallen under legal fire for unsafe virus protocols, but the First Circuit said that her diabetes and high blood pressure diagnoses, her inability to find an attorney while detained and the general chaos of the COVID-19 pandemic all warranted hearing out her request to pause the deadline.

"For us to take the first pass would be particularly inappropriate here, given that James specifically indicated that she sought to file a written brief fleshing out her arguments, and yet was denied that opportunity when the BIA summarily dismissed her appeal," U.S. Circuit Judge William Kayatta wrote on behalf of a three-member panel on Monday.

James was detained in the Bristol County House of Correction in Massachusetts, or BCHOC, in October 2019, after the U.S. charged her with removability over a series of drug convictions.

A group of immigrant detainees criticized BCHOC for unsafe and crowded conditions amid the national health emergency and successfully **sued for their release** in March 2020. Although James, who was released in April 2020, didn't mention challenges related to COVID-19 in her appeal to the BIA, the circuit court noted that the board "must have been aware" of the pandemic.

A **later investigation** from the Massachusetts Attorney General's Office revealed that BCHOC employees used canines, flash-bangs, pepper spray and pepper-ball projectiles against nonviolent detainees. The U.S. Department of Homeland Security has since ordered Immigration and Customs Enforcement to **end its detention contract** with Bristol County.

James had been ordered removed on Feb. 19, 2020, meaning her 30-day appeal window fell within the "frenzied first month" of the COVID-19 pandemic on March 20, the First Circuit said. James mailed her appeal 10 days later on April 1, and the BIA dismissed her appeal as untimely in June 2020.

The U.S. Department of Homeland Security argued before the First Circuit that the BIA had appropriately addressed James' equitable tolling request by treating it as a separate request to accept a late-filed appeal by certification, according to the First Circuit.

But self-certification and equitable tolling are "not quite the same," the panel said.

While the BIA has the discretion to take a late appeal by certification, individuals seeking equitable tolling must show they are "diligently" pursuing their rights, but are hampered by an extraordinary circumstance, and James' request was "crystal clear," the panel said.

The National Immigration Litigation Alliance's Trina Realmuto, who took on James' case after her failed appeal attempt, said that immigrants nationwide face serious obstacles trying to meet the 30-day appeal deadline, especially immigrants in detention.

Even without a pandemic, detained individuals have to contend with the detention mailing system to receive and submit the necessary documents on time, and unrepresented immigrants may attempt to find an attorney before appealing a removal order to the BIA, Realmuto said during a Tuesday call.

However, the board has never specifically addressed whether they may toll the appeal deadline, according to Realmuto.

"We hope the board will take this opportunity to rule," Realmuto said.

The U.S. Department of Justice didn't immediately respond to a Tuesday request for comment.

U.S. Circuit Judges David Barron and William Kayatta and U.S. District Judge Patti B. Saris sat on the panel for First Circuit.

James is represented by Trina Realmuto, Kristin Macleod-Ball and Tiffany Lieu of the National Immigration Litigation Alliance and Kira Gagarin.

The U.S. is represented by Jeffrey R. Meyer, Brian Boynton and Stephen J. Flynn of the U.S. Department of Justice's Office of Immigration Litigation.

The case is James v. Garland, case number 20-1666, in the U.S. Court of Appeals for the First Circuit.

--Editing by Ellen Johnson.

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